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PLATT ON LEASES,

WITH

Forms and Precedents.



A TREATISE
ON THE
LAW OF LEASES;

WITH
Forms and Precedents.

BY
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NETUIT QUI SPERAT.

IN TWO VOLUMES.

VOL. I.

LONDON:
A. MAXWELL AND SON, 32, BELL YARD, LINCOLN'S INN;
AND
HODGES AND SMITH, GRAFTON STREET, DUBLIN.

MDCCCXLVII.

LONDON:
BRADBURY AND EVANS, PRINTERS, WHITEFRIARS.

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P6977L
1847

PREFACE.

IF the value of a work depended on the interest of the subject selected, the one now submitted to the Profession might fearlessly compete for favour with its many distinguished predecessors; for few there are who pass through life unaffected by the discussions contained in it, either directly as principals, or indirectly in a representative character. But I am aware that neither the importance of a theme nor its practical utility can supply the defects of imperfect analysis or inadequate illustration. With this principle in view at the commencement and during the progress of my task, I earnestly applied myself to the branch of Law investigated in these pages. To perform my duty, I have exerted my best powers, neither shrinking from labour, nor yielding to anxiety or fatigue. The result in print, however, assures me that I proposed to myself a standard beyond my reach; and I am painfully sensible of the difference between design and execution. From these remarks, it will appear, that whatever errors may be discovered in my work are traceable to want of judgment, and not to indolence. In extenuation, I can only say, that, in possession of more learning than has fallen to my lot, I should have produced a better book. At the same time, I trust that my endeavours will not be wholly futile; that they may at least put the Reader in the way of obtaining further

information from the Reports and Statutes referred to, the only legitimate basis of a treatise of this nature.

To anticipate an objection which I cannot but foresee, it may be well to state, that I have thought it more advisable in a few instances to examine under one head the several subordinate and collateral bearings of my subject, than to distribute them under separate divisions of the work. This will be particularly observable in the Chapter on the *Reddendum*, where not only the considerations peculiarly appropriate to that division, but the ramifications incident to it, such as the suspension and apportionment of rent, the effect of the statutes of limitation on the lessee's liability to pay rent, and the relief afforded in Equity, have also been discussed. A similar course has been pursued in the Chapter on Renewals. The convenience of the plan compensates for a departure from a more logical arrangement.

The general rules for the construction of a Lease, and the law relating to its alteration by erasure, cancellation, and the like, as well as to its being duly executed, being common to all deeds, have not been specifically noticed, as they offer nothing particularly applicable to, or illustrative of, the doctrine under consideration.

Some perhaps may think that needless care has been taken to distinguish the various modes of spelling the names of the same cases. To me, however, it appears, that, in an arduous Profession like the Law, every aid to economise time and trouble should be rendered available. One person may be familiar with a case by one name, say, *Hilman v. Hore*, (as in *Carth.* 247;) another, with the same case by another name, say, *Holman v. Hoare*, (as in 3 *Salk.* 152;) and as each would search for it only in its appropriate place in an alphabetical list of Cases, one of the two would be disappointed, unless it were entered

under both. It has, therefore, been deemed advisable to notice the variations whenever the change or transposition of a letter would assign to the word a different position in the list. The utmost caution, however, is insufficient to prevent such occasional mistakes as Chaundflower for Chanudflower, (as in Vol. II., p. 312, n. (*u*), and Corfe for Corpe, (as in Vol. II., p. 229, n. (*i*)). It is hoped that they are few and far between. Those discovered are corrected in the Table of Cases prefixed to this volume, where the proper names will be found.

With much the same object, and to prevent confusion and mistake, the Reports, instead of being referred to by their initial letters, (as B. and A., for Barnewall and Alderson,) have, in general, the first syllable at least of the Reporters' names mentioned; the utility of which will be obvious from the following comparison, which shows how many different Reporters, by a singular coincidence, are recognised by the same initials, thus:—

B. & A.	may signify either	{	Barnewall & Alderson, or Barnewall & Adolphus ;
B. & B.	” ”	{	Broderip & Bingham, or Ball & Beatty ;
B. N. C.	” ”	{	Brooke's Novel Cases, or Bingham's New Cases ;
C. & M.	” ”	{	Crompton & Meeson, or Carrington & Marshman ;
C & P.	” ”	{	Carrington & Payne, or Craig & Phillips ;
D. & C.	” ”	{	Deacon & Chitty, or Dow & Clark ;
D. P. C.	” ”	{	Dow's Parliamentary Cases ; or Dowling's Practical Cases ;
D. & W.	” ”	{	Drury & Warren, or Drury & Walsh ;
Jo.	” ”	{	Sir William Jones, Sir Thomas Jones, or, Jones, Irish Exchequer ;

M. & M.	may signify either	{	Moody & Malkin, or Montagu & MacArthur ;
M. & R.	” ”	{	Manning & Ryland, or Moody & Robinson ;
M. & S.	” ”	{	Maule & Selwyn, or Moore & Scott ;
Phil.	” ”	{	Phillips, or Phillimore ;
R. & M.	” ”	{	Ryan & Moody, or Russell & Mylne ;
S. & S.	” ”	{	Simons & Stuart, or Sausse & Scully ;

and, probably, additions to these may easily be made. The Abbreviations adopted in this Work will succeed the Table of Cases.

In citing the Reports, I have not contented myself with noticing the first page of the book containing the case quoted, but have usually also pointed out the particular place in which an authority for the proposition in question is to be found ; a plan by which reference will be greatly facilitated.

The difficulty of procuring good Precedents of Leases is greater than can be conceived. They are often prepared by persons not very conversant with Conveyancing, and are proportionably loose and unsatisfactory. Those contained in the Appendix to this work have been selected from a large number, as best calculated, from their various objects, to prove of practical service.

In preparing the detached Forms, I have aimed at a middle course, and, while divesting them of much of the abundant phraseology by which they have hitherto been characterised, have endeavoured to preserve the technical style and *cantilena* so desirable in all formal Instruments. It is scarcely necessary

to add that a variety of *Forms*, not in the first part of the Appendix, will be found amongst the *Precedents*.

My reasons for omitting to supply some short Precedents under the Act of 8 & 9 Vict. c. 124, "to facilitate the granting of certain leases," lie in a narrow compass. The first and principal one is, that I believe leases of the description alluded to are, and will continue, almost wholly unknown in practice. With great submission to those who entertain a different opinion, I cannot think that a good system which renders reference to a foreign instrument necessary to the construction of the one by which parties profess to be bound; their own being in fact but a brief abstract of a document to which they can rarely have access otherwise than through the agency of their professional adviser, and being comprised in terms which are to signify much beyond their ordinary import. I doubt whether the diminution of expense will, after all, be so great as the advocates for the Act anticipate; for the length of a qualification, where necessarily introduced, will, in a great degree, counterbalance the saving effected by the adoption of the Statutory form. Suppose, for example, a party to take a lease on the understanding that he is to pay rent, and to repair during the term, and to yield up possession of the premises in repair at the end of the term, without reference to accidents by fire: In this case, he would, in compliance with the Statute, covenant "to pay rent," (as in column I., No. 1.,) "and to repair," (as in column I., No. 3.,) "and" (varying the style) "that he will leave premises in good repair," (as in column I., No. 10;) but, on referring to column II. of that number, it appears that those words signify that he is not to leave them in good repair under all circumstances, but is to have the benefit of an exception of "reasonable wear and tear

and damage by fire," which would be clearly inconsistent with the former general covenant to repair. The Draftsman would, therefore, be put to the alternative of declaring, in some form of words, that the covenant to yield up in repair should not be construed to contain the exception, or of setting out the covenant at full length without the exception ; thus presenting a sad medley of ordinary and statutory forms in the same deed. It is fortunate, however, that they who desire their leases to be prepared in conformity with the Act, which, together with the abridged Forms, is inserted in the Appendix, Vol. II., p. 577, *et seq.*, will find in it ample directions for their guidance. The real evil to be complained of is not so much the length of the usual clauses, as the severe pressure of the stamp duties, from which even the Counterpart and Duplicate are not exempt.

An analytical Table of Contents, with corresponding pages, and a copious verbal Index, by rendering the work accessible in its detail, have been considered sufficient to supersede a marginal abstract throughout the work.

And now I dismiss a subject which has engaged my attention for some years in the intervals of business, and cannot but feel that, although in the toil of this life our endeavours fail of success, the mind finds a secret reward in the consciousness of an attempt to be useful.

THOMAS PLATT.

4, STONE BUILDINGS, LINCOLN'S INN,
30th June, 1847.

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- X.—Underlease, by a mortgagee and mortgagor, of a house and premises in the city of London, held under the Dean and Chapter of St. Paul's Cathedral; with a provision for payment of the rent to the mortgagor, with power of distress, till notice by the mortgagee; indemnity

against claims of original landlord. The lessee covenants to pay renewal fine and expenses; the lessor covenanting to assign or underlet to the lessee the renewed term for securing the advance and interest, ii. 685

XI.—Lease of a cotton-mill, machinery and gear, &c., for a term of years, at a yearly rent, subject to suspension in case of fire: the lessee covenanting to pay an additional rent for the use of a culvert, and also an annual chief rent, to lay out a given sum in repairs, and to keep repaired, damage by fire excepted. The lessors to have option of purchasing, at end of term, machinery erected by lessee; and to accept payment of rent by bills of exchange, ii. 690

XII.—Underlease by three joint tenants, of a house in the Regent's Park, with the use of foot and carriage-way, and ornamental gardens, in common with neighbourhood, besides ordinary covenants to pay rent, &c.; covenant by underlessee to contribute proportion towards expenses of maintaining roads and ornamental garden, and watching and police; to insure; to paint in a mode prescribed, at specified periods; with power to underlessors to do work on default, and recover expenses as rent. Power of entry to underlessors to take schedule of fixtures, to see condition of premises, and to repair adjoining premises. Powers to park gate-keepers to exclude carts, &c.; and other provisions adapted to general benefit of the neighbourhood. Power to underlessee to determine lease at end of first five, seven, or fourteen years of term, ii. 694

XIII.—Lease by surviving trustee, granted under an order of the Court of Chancery, of a farm in the county of Norfolk; reserving to lessor all brick-earth, fish, timber, trees, &c., hunting, hawking, shooting, &c., for eight years, at a fixed rent; and an additional rent for every acre of pasture converted into tillage, or used contrary to good husbandry. Proviso for lessor's re-entry on lessee's nonpayment of rent, &c.; becoming bankrupt or insolvent, &c. Covenant by lessor to keep buildings in repair, and set out rough timber; to allow bushes, &c., for firing. Power to lessee to dig clay and marl. Lessor to make lessee allowance for thrashing and dressing last year's crop on premises, &c. Covenant by lessee to pay rent and taxes—to reside in farm-house—to keep premises repaired—to perform carriage work for lessor—to find beer for workmen—to supply wheat-straw—to scour ditches, &c., clip hedges, preserve trees, &c.; to bring actions against trespassers, &c.; to cultivate land according to four-course system, &c., and to consume muck on premises, &c. Arrangements as to incoming tenants, and various other provisions applicable to farming in that county, ii. 706

XIV.—Lease by tenant for life, under a power, of a farm in the county of Berks, at rents varying every fourth year of the term, calculated on average price of corn for preceeding four years, and an additional rent for

every acre of pasture converted into tillage. Covenants applicable to the cultivation of a farm in that county. Lessee to give up any twenty acres, on receiving six months' notice, and annual allowance for same; to provide food and lodging for lessor's steward and attendants, not exceeding eight persons, on holding court; and stable room for horses; allowance to be made to lessee. Lessor to find timber for repairs, and to pay moiety of expense of repairs, except windows and thatching, ii. 718

XV.—Agricultural provisions contained in a lease of lands in the Isle of Ely, ii. 724

XVI.—Lease of a farm in the county of Londonderry, in Ireland, with appropriate clauses for its management; and power to the lessee to cut bog or turf for domestic consumption. Power to the lessors to resume any part, on notice, and payment of compensation; to be settled in case of dispute by referees. Proviso for re-entry on the lessee's not paying rent, continuing to reside, assigning or underletting, building, digging, offending against revenue laws, or becoming bankrupt or insolvent, &c., ii. 729

XVII.—Lease for twenty-one years, by trustees of a term of years, under a will, of a furnace and iron-works, of land, and of mines of coal and ironstone, reserving a surface rent, and royalties varying with the productions of the mine, and the different qualities and market value of the minerals; with stringent clauses for the due working of the mines, &c., adapted to an extensive undertaking, ii. 740

XVIII.—Lease of lands in the county of Somerset by trustee of a term, mortgagee, and mortgagor, and of a coal mine underneath; with the usual powers for working same; reserving a fixed surface rent for a part of the term, and augmented rent for the remainder, and a royalty of one-eighth of the gross moneys for which coal shall be sold, and a proportionate part on determination of the term before its effluxion by time; with a covenant to raise all the coal within the first twenty-five years, or to pay for coal unwrought at a valuation. Power to lessee to determine lease at end of first twenty-five, thirty-five, or forty-five years of term; and lessee to have right of pre-emption on sale by mortgagor.

[A concise precedent, the lessee's object being rather to sink a shaft to work under adjoining property, than to obtain the coal under the lands demised, ii. 782]

XIX.—Lease of a lead mine in the North Riding of the county of York, by trustees under a power; reserving, by way of royalty, a fifth of the smelted lead, before extraction of the silver; with power of distress to the lessors. The lessors to have a right of purchasing the machinery and engines, &c., at the end of the term; and the lessees to have a right of determining the lease on a given day. With appropriate clauses for the due working of the mine, ii. 792

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ABBREVIATIONS

OF

REPORTS, ABRIDGMENTS, DIGESTS, AND TEXT BOOKS,

Cited or referred to in this Work, with their respective full titles.

ABBREVIATIONS.	FULL TITLES.
Adol. & Ell.	Adolphus and Ellis's Reports
Alc. & Nap.	Alcock and Napier's Reports, (King's Bench and Exchequer Chamber, Ireland,)
Al.	Aleyn's Reports
Ambl.	Ambler's Reports
And.	Anderson's Reports
Andr.	Andrews's Reports
Anstr.	Anstruther's Reports
Archb. B. L.	Archbold's Bankrupt Laws
Archb. Prac. by Chit.	Archbold's Practice by Chitty
Arms. Mac. & Ogle	Armstrong, Macartney and Ogle's Reports, (Nisi Prius, Ireland,)
Arn.	Arnold's Reports
Arn. & Hodg.	Arnold and Hodges's Reports
Atk.	Atkyns's Reports
Bac. Ab.	Bacon's Abridgment
Bac. Ab. by Gwil. & Dodd	Bacon's Abridgment, by Gwillim and Dodd
Bac. on Leases	Bacon on Leases
Ball & Beat.	Ball and Beatty's Report, (Chancery, Ireland,)
Barnard. Ch.	Barnardiston's Chancery Reports
Barnard. K. B.	Barnardiston's King's Bench Reports
Barnes,	Barnes's Notes
Barn. & Adol.	Barnewall and Adolphus's Reports
Barn. & Ald.	Barnewall and Alderson's Reports
Barn. & Cres.	Barnewall and Cresswell's Reports
Batty,	Batty's Reports, (King's Bench, Ireland,)
Beat.	Beatty's Reports, (Chancery, Ireland,)
Beav.	Beavan's Reports
Bendl.	Bendloe's Reports
Benl. & Dal.	Benloe and Dalison's Reports
Bing.	Bingham's Reports
Bing. N. C.	Bingham's New Cases
Bla. Com.	Blackstone's Commentaries
H. Bla.	Blackstone's (H.) Reports
W. Bla.	Blackstone's (W.) Reports
Bli. P. C.	Bligh's Parliamentary Cases, (House of Lords,)
Bli. P. C., N. S.	Bligh's Parliamentary Cases, (House of Lords,) (New Series)

ABBREVIATIONS.	FULL TITLES.
Blunt's Hist. of the Re-formation	Blunt's History of the Reformation
Bos. & Pul.	Bosanquet and Puller's Reports
J. Bridgm.	Bridgman's (Sir John) Reports
O. Bridgm. by Bann.	Bridgman's (Sir Orlando) Reports, by Bannister
Bro. N. C.	Brooke's Novel Cases
Brod. & Bing.	Broderip and Bingham's Reports
Bro. Ab.	Brooke's Abridgment
Bro. C. C.	Brown's Chancery Cases
Bro. P. C.	Brown's Parliamentary Cases
Brownl.	Brownlow's Reports
Brownl. & Gold.	Brownlow and Goldesborough's Reports
Buck,	Buck's Reports
Bull. N. P.	Buller's Nisi Prius
Bulstr.	Bulstrode's Reports
Bunb.	Bunbury's Reports
Burr.	Burrow's Reports
Byth. Conv. by Jarm.	Bythewood's Conveyancing, by Jarman
Cald.	Caldecott's Reports
Campb.	Campbell's Reports
Carr. & Pa.	Carrington and Payne's Reports
Carr. & Kir.	Carrington and Kirwan's Reports
Carr. & Marsh.	Carrington and Marshman's Reports
Carth.	Carthew's Reports
Cart.	Carter's Reports
Cary,	Cary's Reports
Ca. in Ch.	Cases in Chancery
Ca. temp. Hardw. by Ridg.	Cases <i>tempore</i> Hardwicke, by Ridgeway
Lee	Cases <i>tempore</i> Hardwicke, by Lee
Ca. temp. Talb.	Cases <i>tempore</i> Talbot
Chamb. on Leases	Chambers on Leases
Chance on Pow.	Chance on Powers
Chit.	Chitty's Reports
Chit. on Stamps	Chitty on Stamps
Cla. & Fin.	Clark and Finnelly's Parliamentary Reports
Clayt.	Clayton's Reports
Co.	Coke's Reports
Co. Copyh.	Coke's Copyholder
Co. Law Tr. by Serj. Hawk.	Coke's Law Tracts by Serjeant Hawkins
Co. Lit.	Coke on Littleton
Co. Lit. by Thomas	Coke on Littleton, by Thomas
Colles, P. C.	Colles's Parliamentary Cases
Coll.	Collier's Reports, (Vice-Chancellor,)
Coll. Proc. on Baron.	Collins's Proceedings on Baronies
Coll. on Stamps	Collins on Stamps
Comb.	Comberbach's Reports
Com. Landl. & Ten.	Comyn's Landlord and Tenant
Com. Dig.	Comyn's Digest
Com.	Comyn's Reports
Con. & Law.	Connor and Lawson's Reports, (Chancery, Ireland,)
Cooke & Alc.	Cooke and Alcock's Reports, (King's Bench, Ireland,)
Coop.	Cooper's (George) Reports
Coop. Sel. Ca., temp.	Cooper's Select Cases, <i>tempore</i> Lord Brougham
Brougham	
Coop.	Cooper's (Charles Parton) Cases in Chancery
Coote's Landl. & Ten.,	Coote's Landlord and Tenant
or (L. & T.)	

ABBREVIATIONS.	FULL TITLES.
Cov. on Stamps . . . . .	. Coventry on Stamps
Cowp. . . . .	. Cowper's Reports
Cox, . . . . .	. Cox's Reports
Crawf. & Dix's Abr. . . . .	. Crawford and Dix's Abridged Notes of Cases, (Ireland,)
Crawf. & Dix, . . . . .	. Crawford and Dix's Reports, (Irish Circuit,)
Cro. Car. . . . .	. Croke's Reports in the Reign of King Charles
Cro. Eliz. . . . .	. Croke's Reports in the Reign of Queen Elizabeth
Cro. Jac. . . . .	. Croke's Reports in the Reign of King James
Crompt. & Jerv. . . . .	. Crompton and Jervis's Reports
Crompt. & Mees. . . . .	. Crompton and Meeson's Reports
Crompt. Mees. & Ros. . . . .	. Crompton, Meeson, and Roscoe's Reports
Cru. Dig. . . . .	. Cruise's Digest
Cr. & Phil. . . . .	. Craig and Phillips's Reports
Cunn. . . . .	. Cunningham's Reports
Danv. Ab. . . . .	. Danvers's Abridgment
Dauids. Prec. . . . .	. Davidson's Precedents
Dav. & Meriv. . . . .	. Davison and Merivale's Reports
Dav. . . . .	. Davys's Reports
Deac. . . . .	. Deacon's Reports
Deac. & Chit. . . . .	. Deacon and Chitty's Reports
De Gex . . . . .	. De Gex's Reports
Dibb on Reg. . . . .	. Dibb on Registration
Dick, . . . . .	. Dickens's Reports
Dr. & Stud. by Much. . . . .	. Doctor and Student, by Muchall
Dougl. . . . .	. Douglas's Reports
Dow's P. C. . . . .	. Dow's Parliamentary Cases, (House of Lords,)
Dow & Cl. . . . .	. Dow and Clark, House of Lords
Dowl. Pr. Ca. . . . .	. Dowling's Practical Cases
Dowl. Pr. Ca., N. S. . . . .	. Dowling's Practical Cases, (New Series,)
Dowl. & Lownd. . . . .	. Dowling and Lowndes's Reports
Dow. & Ry. . . . .	. Dowling and Ryland's Reports
Drinkw. . . . .	. Drinkwater's Reports
Dru. . . . .	. Drury's Reports, (Chancery, Ireland,)
Dru. & Wal. . . . .	. Drury and Walsh's Reports, (Chancery, Ireland,)
Dru. & War. . . . .	. Drury and Warren's Reports, (Chancery, Ireland,)
Duke's Charit. Uses, } Bridgm. Ed. }	. Duke's Charitable Uses, by Bridgman
Dy. . . . .	. Dyer's Reports
East, . . . . .	. East's Reports
Ed. . . . .	. Eden's Reports
Eq. Ca. Abr. . . . .	. Equity Cases Abridged
Ersk. Inst. . . . .	. Erskine's Institute of the Law of Scotland
Esp. N. P. C. . . . .	. Espinasse's Nisi Prius Cases
Fearne's Posth. . . . .	. Fearne's Posthumous Works
Finch, . . . . .	. Finch's Reports
Fitzgib. . . . .	. Fitzgibbon's Reports
Fitzh. Abr. . . . .	. Fitzherbert's Abridgment
F. N. B. . . . .	. Fitzherbert's Natura Brevium
Flan. & Kel. . . . .	. Flanagan and Kelly's Reports, (Rolls, Ireland,)
Flint. on Real Prop. . . . .	. Flintoff on Real Property
Fonbl. Tr. Eq. . . . .	. Fonblanque's Treatise of Equity
Forr. . . . .	. Forrest's Reports
Fortesc. . . . .	. Fortescue's Reports
Fox & Sm. . . . .	. Fox and Smith's Reports, (King's Bench, Ireland,)
Freem. K. B. . . . .	. Freeman's Reports, (King's Bench and Common Pleas,)

ABBREVIATIONS.	FULL TITLES.
Freem. Ch. . . . .	. Freeman's Chancery Reports
Gale, . . . . .	. Gale's Reports
Ga. & Dav. . . . .	. Gale and Davison
Gibs. Codex, . . . .	. Gibson's Codex Juris Ecclesiastici Anglicani
Gilb. on Rents . . . .	. Gilbert on Rents
Gilb. Ten. . . . .	. Gilbert's Tenures
Gilb. Ten., by Watk. . .	. Gilbert's Tenures, by Watkins
Gilb. on Uses. . . . .	. Gilbert on Uses
Gilb. on Uses, by Sugd. .	. Gilbert on Uses, by Sir Edward Sugden
Gilb. Eq. Rep. . . . .	. Gilbert's Equity Reports
Gilb. K. B. . . . .	. Gilbert's King's Bench Reports
Glyn & Jam. . . . .	. Glyn and Jameson's Reports
Godb. . . . .	. Godbolt's Reports
Gouldsb. . . . .	. Gouldsbrough's Reports
Gow, . . . . .	. Gow's Reports
Gro. & Rud. of Law & Eq.	. Grounds and Rudiments of Law and Equity
Hardr. . . . .	. Hardres's Reports
Hare, . . . . .	. Hare's Reports
Hargr. Co. Lit. . . . .	. Hargrave's edition of Coke on Littleton
Hargr. Jurid. Arg. . . .	. Hargrave's Juridical Arguments
Hargr. Jurisc. Exer. . .	. Hargrave's Jurisconsult Exercitations
Harr. & Wol. . . . .	. Harrison and Wollaston's Reports
Hayes, . . . . .	. Hayes's Reports, (Exchequer, Ireland,)
Hay. & Jo. . . . .	. Hayes and Jones's Reports, (Exchequer, Ireland.)
Hetl. . . . .	. Hetley's Reports
Hob. . . . .	. Hobart's Reports
Hodg. . . . .	. Hodges's Reports
Hog. . . . .	. Hogan's Reports, (Rolls, Ireland,)
Holt, . . . . .	. Holt's Reports
Holt's N. P. C. . . . .	. Holt's Nisi Prius Cases
Horn & Hurl. . . . .	. Horn and Hurlstone's Reports
Huds. & Bro. . . . .	. Hudson and Brooke's Reports, (King's Bench and Exchequer Chamber, Ireland,)
Hurls. & Walms. . . .	. Hurlstone and Walmsley's Reports
Hutt. . . . .	. Hutton's Reports
Inst. . . . .	. Coke's Institutes
Ir. Cir. Rep. . . . .	. Irish Circuit Reports
Ir. Eq. Rep. . . . .	. Irish Equity Reports
Ir. Law Rep. . . . .	. Irish Law Reports
Jacob, . . . . .	. Jacob's Reports
Jac. & Walk. . . . .	. Jacob and Walker's Reports
Jarm. Prec. by Sweet, . .	. Jarman's Precedents, by Sweet
Jebb & Bou. . . . .	. Jebb and Bourke's Reports, (Queen's Bench, Ireland,)
Jebb & Sy. . . . .	. Jebb and Symes's Reports, (Queen's Bench and Exchequer Chamber, Ireland,)
Jenk. Cent. . . . .	. Jenkins's Centuries of Reports
Jo. Ir. Exch. . . . .	. Jones's Reports, (Exchequer, Ireland,)
T. Jo. . . . .	. Jones's (Sir Thomas) Reports
W. Jo. . . . .	. Jones's (Sir William) Reports
Jo. & Cary, . . . . .	. Jones and Carey's Reports, (Exchequer, Ireland,)
Jo. & La Tou. . . . .	. Jones and La Touche's Reports, (Chancery, Ireland,)
Jur. . . . .	. Jurist
Kebl. . . . .	. Keble's Reports
Keen, . . . . .	. Keen's Reports
Kel. . . . .	. Kelyng's Reports

ABBREVIATIONS.	FULL TITLES.
Ken. . . . .	. Kenyon's Reports
Kyd on Corp. . . . .	. Kyd on Corporations
Lane, . . . . .	. Lane's Reports
Latch, . . . . .	. Latch's Reports
Law Jour. . . . .	. Law Journal
Law Jour., N S. . . . .	. Law Journal, New Series
Law Times . . . . .	. Law Times
Leon. . . . .	. Leonard's Reports
Lev. . . . .	. Levinz's Reports
Ley . . . . .	. Ley's Reports
Lil. . . . .	. Lilly's Reports
Ling. Hist. of Engl. . . . .	. Lingard's History of England
Lit. . . . .	. Littleton's Reports
Lit. Ten. . . . .	. Littleton's Tenures
Lloyd & Goo. <i>temp.</i> Sugd. . . . .	. Lloyd and Goold's Reports, <i>tempore</i> Sir Edward Sugden, (Chancery, Ireland,)
Lloyd & Goo. <i>temp.</i> Plunk. . . . .	. Lloyd and Goold's Reports, <i>tempore</i> Lord Plunket, (Chancery, Ireland,)
Lofft, . . . . .	. Lofft's Reports
Long. & Town. . . . .	. Longfield and Townsend's Reports, (Exchequer, Ireland,)
Lutw. . . . .	. Lutwytche's Reports
Macl. & Rob. . . . .	. Maclean and Robinson's Reports, (House of Lords,)
Mc Clel. . . . .	. Mc. Cleland's Reports
Mc Clel. & Yo. . . . .	. Mc. Cleland and Younge's Reports
Macph. on Inf. . . . .	. Macpherson on Infancy
Madd. Ch. Pr. . . . .	. Maddock's Chancery Practice
Madd. . . . .	. Maddock's Reports
Madox Form. Angl. . . . .	. Madox's Formulæ Anglicanum
Man. & Ry. . . . .	. Manning and Ryland's Reports
Man. & Gra. . . . .	. Manning and Granger's Reports
Man., Gran., & Sc. . . . .	. Manning, Granger, and Scott's Reports
Mar. . . . .	. March's Reports
Marsh. . . . .	. Marshall's Reports
Mau. & Selw. . . . .	. Maule and Selwyn's Reports
Meriv. . . . .	. Merivale's Reports
Mees. & Wels. . . . .	. Meeson and Welsby's Reports
Mod. . . . .	. Modern Reports
Mol. . . . .	. Molloy's Reports, (Chancery, Ireland,)
Mont. . . . .	. Montagu's Reports
Mont. & Ayr. . . . .	. Montagu and Ayrton's Reports
Mont. & Ayr. B. L. . . . .	. Montagu and Ayrton's Law of Bankruptcy
Mont. & Chit. . . . .	. Montagu and Chitty's Reports
Mont. & Macar. . . . .	. Montagu and Macarthur's Reports
Mont. Deac. & De Gex. . . . .	. Montagu, Deacon, and De Gex's Reports
Mont. & Bli. . . . .	. Montagu and Bligh's Reports
Mood. & Malk. . . . .	. Moody and Malkin's Reports
Mood. & Rob. . . . .	. Moody and Robinson's Reports
Mo. . . . .	. Moore's (Sir Francis) Reports
J. B. Mo. . . . .	. Moore's (John Bayly) Reports
Mo. & Pa. . . . .	. Moore and Payne's Reports
Mo. & Sc. . . . .	. Moore and Scott's Reports
Mos. . . . .	. Mosely's Reports
Mur. & Hurl. . . . .	. Murphy and Hurlstone's Reports
Myl. & Cr. . . . .	. Mylne and Craig's Reports
Myl. & K. . . . .	. Mylne and Keen's Reports
Nels. . . . .	. Nelson's Reports

ABBREVIATIONS.	FULL TITLES.
Nev. & Man. . . . .	. Nevile and Manning's Reports
Nev. & Per. . . . .	. Nevile and Perry's Reports
New Rep. . . . .	. New Reports, (Bosanquet and Puller's,)
Noy, . . . . .	. Noy's Reports
Ow. . . . .	. Owen's Reports
Palm. . . . .	. Palmer's Reports
Park. . . . .	. Parker's Reports
Peake's N. P. C. . . . .	. Peake's Nisi Prius Cases
Peake's Add. Ca. . . . .	. Peake's Additional Cases
P. Wms. . . . .	. Peere Williams's Reports
Perk. . . . .	. Perkins's Profitable Book
Per. & Dav. . . . .	. Perry and Davison's Reports
Phil. . . . .	. Phillips's Reports
Plowd. . . . .	. Plowden's Commentaries or Reports
Pollexf. . . . .	. Pollexfen's Reports
Poph. . . . .	. Popham's Reports
Pow. Mortg. by Cov. . . . .	. Powell on Mortgages, by Coventry
Prec. Ch. . . . .	. Precedents in Chancery
Prest. Abst. . . . .	. Preston on Abstracts
Prest. Conv. . . . .	. Preston on Conveyancing
Pri. . . . .	. Price's Reports
Priv. Lond. . . . .	. Privilegia Londini
Q. B. . . . .	. Queen's Bench Reports, (Adolphus and Ellis's,)
Lord Raym. . . . .	. Raymond's (Lord) Reports
T. Raym. . . . .	. Raymond's (Sir Thomas) Reports
Real Prop. Rep. . . . .	. Real Property Reports
Reeves's Hist. Engl. L. . . . .	. Reeves's History of the English Law
Rep. in Ch. . . . .	. Reports in Chancery
Rep. temp. Finch . . . . .	. Reports <i>tempore</i> Finch
Rep. temp. Hardw. by West . . . . .	. Reports <i>tempore</i> Hardwicke, by West
Ridgew. P. C. . . . .	. Ridgeway's Parliamentary Cases
Ridgway, Lapp, & Sch. . . . .	. Ridgway, Lapp and Schoales, (King's Bench, Ireland,)
Rigge on Reg. . . . .	. Rigge on Registration
Rob. on Gav. . . . .	. Robinson on Gavelkind
Rob. & Maclean . . . . .	. Robinson and Maclean's Reports
Rol. Parl. . . . .	. Rolls of Parliament
Rol. . . . .	. Rolle's Reports
Rol. Abr. . . . .	. Rolle's Abridgment
Rop. Husb. & W. . . . .	. Roper's Law of Husband and Wife
Rose, . . . . .	. Rose's Reports
Russ. . . . .	. Russell's Reports
Russ. & Myl. . . . .	. Russell and Mylne's Reports
Ry. & Moo. . . . .	. Ryan and Moody's Reports
Salk. . . . .	. Salkeld's Reports
Sand. on Uses, by Sand. & Warn.	} Sanders on Uses, by Sanders and Warner
Saund.	
Saund. & Law. . . . .	. Saunders's Reports
Sau. & Scul. . . . .	. Saunders and Lawes's Reports, (Bail Court,)
Sav. . . . .	. Sausse and Scully's Reports, (Rolls, Ireland,)
Sav. . . . .	. Savile's Reports
Say. . . . .	. Sayer's Reports
Scho. & Lef. . . . .	. Schoales and Lefroy's Reports, (Chancery, Ireland,)
Scott, . . . . .	. Scott's Reports
Scott's N. R. . . . .	. Scott's New Reports
Scriv. Cop. . . . .	. Scriven on Copyholds
Sel. Ca. in Ch. . . . .	. Select Cases in Chancery

ABBREVIATIONS.	FULL TITLES.
Selw. N. P.	Selwyn's Nisi Prius
Shep. Touch.	Sheppard's Touchstone
Shep. Touch. by Prest.	Sheppard's Touchstone, by Preston
Show.	Shower's Reports
Show. P. C.	Shower's Parliamentary Cases
Sim.	Simons's Reports
Sim. & Stu.	Simons and Stuart's Reports
Skin.	Skinner's Reports
Smith,	Smith's Reports
Sm. & Bat.	Smith and Batty's Reports, (King's Bench, Ireland,)
Smythe,	Smythe's Reports, (Common Pleas and Exchequer Chamber, Ireland,)
Spelm. Glos.	Spelman's Glossarium Archæologicum
Stanf. Prerog.	Stanford's Prerogatives of the Crown
Stark.	Starkie's Reports
Steph. Com.	Stephen's Commentaries
Stra.	Strange's Reports
Sty.	Styles's Reports
Sugd. Pow.	Sugden's (Sir Edward) Powers
Sugd. Vend. & Purch. } or, V. & P. }	Sugden's (Sir Edward) Vendors and Purchasers
Swanst.	Swanston's Reports
Taml.	Tamlyn's Reports
Taunt.	Taunton's Reports
Term Rep.	Term Reports, (Durnford and East,)
Tils. on Stamps,	Tilsley on Stamps
Times Newsp.	Times Newspaper
Toll. Ex.	Toller's Executors
Toth.	Tothill's Reports
Turn. & Russ.	Turner and Russell's Reports
Tyrw.	Tyrwhitt's Reports
Tyrw. & Gra.	Tyrwhitt and Granger's Reports
Vaugh.	Vaughan's Reports
Vent.	Ventris's Reports
Vern.	Vernon's Reports
Vern. & Scriv.	Vernon and Scriven's Reports, (Ireland,)
Ves.	Vesey's Reports
Ves. Jun., for the first 2 } Vols., and afterwards, } Ves. }	Vesey junior's Reports
Ves. & B.	Vesey and Beames's Reports
Vin. Ab.	Viner's Abridgment
Wall. by Lyne,	Wallis's Reports by Lyne, (Chancery, Ireland,)
Watk. Conv.	Watkins on Conveyancing
Watk. Cop.	Watkins on Copyholds
West's App. Ca.	West's Appeal Cases
Wightw.	Wightwick's Reports
Willes,	Willes's Reports
Will. Wol. & Hodg.	Willmore, Wollaston, and Hodges's Reports
Wilm.	Wilnot's Reports
Wils.	Wilson's Reports, (King's Bench,)
Wils. Ch.	Wilson's Reports, (Chancery,)
Wils. Exch.	Wilson's Reports, (Exchequer,)
Wils. on Reg.	Wilson on Registration
Winch,	Winch's Reports
Winch Entr.	Winch's Entries

ABBREVIATIONS.	FULL TITLES.
Wing. Max.	.Wingate's Maxims
Woodd. Vin. Lect.	.Wooddeson's Vinerian Lectures
Woodf. Landl. & Ten. or, L. & T., by Harr.	} Woodfall's Landlord and Tenant, by Harrison
The abbreviation of the Year Books will be found in p. cxxix, sup.	} Year Books
Yelv.	.Yelverton's Reports
Yo.	.Younge's Reports
Yo. & Col. Exch.	.Younge and Collyer's Reports, (Exchequer,)
Yo. & Col. V. C.	.Younge and Collyer's Reports, (Vice Chancellor,)
Yo. & Jerv.	.Younge and Jervis's Reports

ADDENDA.

- Vol. I. p. 9, note (*d*), *add*, *Cooch v. Goodman*, 2 Q. B. 580. 590; S.C. 2 Ga. & Dav. 159.
- „ 58, „ (*t*), „ *Gouldsworth v. Knights*, 12 Mees. & Wel. 337.
- „ 96, „ (*a*), „ *Story v. Johnson*, 2 Yo. & Col. Exch. 586. 606.
- „ 174, line 31, after the words “in gross” *add*, “unless altered by 8 & 9 Vict. c. 106, as to which *see* REDDENDUM, Vol. II. p. 98-9.”
- „ 186 *et seq.* The act of 8 & 9 Vict. c. 99, should be read in connection with the division relating to leases by the Crown and its officers :—
- Sect. 1 enables the Commissioners of Woods, Forests, &c., to lease any portion of the shore of the sea, or of navigable rivers, or of lands derelict or gained from the sea, for any term not exceeding ninety-nine years, without taking a covenant for erecting buildings, where lessees shall engage to construct embankments or docks, &c.
- Sect. 2 enables the Commissioners to grant leases to persons who, in ignorance of title of Crown, have built on Crown lands, with reference only to the value of the land as building ground.
- Sect. 3 confirms leases previously granted for building at different rents for different portions of the term, instead of at one uniform rent.
- Sect. 4 empowers the Commissioners to grant future building leases at different rents for different portions of the term.
- Sect. 5 provides that license or waiver of forfeiture by Commissioners shall extend only to the particular breach, and not prevent proceeding for subsequent breach.
- Sect. 6 enables the Commissioners to accept surrender, and to grant separate leases of hereditaments surrendered, at apportioned rents.
- Sect. 7 provides that such surrenders shall be within 4 Geo. 2. c. 28, relating to the surrender of underleases. [As to which, *see* this Vol. p. 787].
- Sect. 8 enables the Commissioners to relieve tenants from forfeiture for non-insurance; and to designate persons in whose names, instead of those of commissioners, insurances are to be made.
- „ 318, note (*r*), *add*, *Simpson v. Ready*, 12 Mees. & Wel. 736; S. C. 1 Dowl. & Lown. 1024.

Vol. II. p. 196, *add* the case of *Payne v. Haine*, or *Hayne*, relating to the construction of a covenant to repair, (noticed in Vol. II. p. 196,) which has appeared (*Law Jour.*, *Exch. Pl.*, *H. T.* 1847; *Law Times*, Vol. VIII. pp. 123. 414,) during the progress of these sheets through the press. The tenant agreed, at the expiration of the tenancy, to deliver up the premises in good repair, order, and condition. Baron Platt, who tried the cause, directed the jury to consider the state of the premises when the tenant came into possession, and stated that it was sufficient for him to leave them in as good condition as he found them; but a rule *nisi* for a new trial was afterwards made absolute; Baron Alderson observing, that, in *Stanley v. Towgood*, the rule laid down is, that you are not to take into consideration the condition of the premises at the time of the demise, but only the class of the premises, as, for instance, whether it is an old or a new house. The learned Baron admitted that it is a rule very difficult in application.

CORRIGENDA.

- Vol. I. p. xxxiv, line 8, *for* "premises" *read* "premiums."
- " 27, note (y), *for* "Chap. VIII.," *read* "Chap. IX."
- " 238, line 9, *for* "would," *read* "could."
- " 312, " 26, *for* "V.," *read* "IV."
- " 590, note (b), *dele* "infra."
- " 655, " (u), in 2 Dick. *dele* "2."
- Vol. II. p. 197, note (f), *for* "1 Co. & Dav.," *read* "1 Ga. & Dav."
- " 329, " (x), *for* "Walton, 6 Bing. N. C.," *read* "Watson, 4 Bing. N. C."
- " 333, " (r), *for* "Roe dem. Chandless," *read* "Doe dem. Chandless."
- " 562, " (f), *for* "p. 547," *read* "p. 550."

A TREATISE
ON
THE LAW OF LEASES.

INTRODUCTORY REMARKS.

A GLANCE at the early history of tenures discloses many important features of distinction between the ancient and present condition of a lessee for years; and it is interesting, if not instructive, to trace the gradual amelioration of his state, and the steps by which his existing rights and privileges have been developed and secured.

The period when terms of years were first granted can scarcely be fixed with certainty; but, if unknown to the Anglo-Saxons, there is every reason to believe that they were of common occurrence for some time anterior to the reign of Edward the First; as the statute of 6 Edward 1. c. 11 (*a*), refers to a letting for a term of years apparently as an ordinary event; and the statute *De Viris Religiosis* (*b*) imposed

(*a*) The term in the Act, *si home baut sun tenement a terme de anz*, is translated, as well in the Statutes of the realm, published in 1810 under the sanction of the Record Commissioners, as in those edited by Ruffhead and

Tomlins, "if a man *lease* his tenement for term of years."

(*b*) 7 Edw. 1. Stat. 2. c. 1. "Quod nullus religiosus aut alius quicunque terras aut tenementa aliqua emere vel vendere aut sub colore donationis aut

the penalty of forfeiture on any person religious or other whatsoever that would buy or sell, or under the colour of gift or lease receive, any lands or tenements whereby they might come into mortmain.

At first, the tenant appears to have been regarded rather as the bailiff or servant of the lord, and accountable for the profits, than as having any direct property in the land (*c*). By degrees, however, he assumed a more independent position, and acquired a defined, though limited, interest in the soil itself, rendering provisions, grain, or other agricultural produce as a recompense for the enjoyment; a circumstance to which we may refer the adoption in modern leases of the words "and to farm let;" the word *farm* or *feorme* being an old Saxon term, signifying provisions (*d*).

The term granted was originally of short duration (*e*); indeed, it is stated by Coke, that by the ancient law of England for many respects a man could not have made a lease above forty years at the most, for then was it said that by long leases many were prejudiced, and many times men disherited (*f*). He adds, that the law was then antiquated; and Blackstone mentions (*g*) that Madox, in his *Formulare Anglicanum* (*h*), notices some leases for years of the reigns of Rd. 2 and Edwd. 4, which considerably exceeded that period.

termini vel alterius tituli cujuscunque ab aliquo recipere aut alio quovis modo arte vel ingenio sibi appropriare præsumat sub forisfacturâ eorundem per quod ad manum mortuam terre et tenementa hujusmodi deveniant quoquo modo." The words *sub colore donationis aut termini* are translated, as well in the Statutes of the realm, mentioned in the preceding note, as in Ruffhead's & Tomlins's, "under colour of gift or lease."

(*c*) Gilb. Ten. 30. Bacon on Leases, 1. 2 Bla. Com. 141. Case of the Queensbury Leases, 1 Bli. P. C. 458.

(*d*) 2 Bla. Com. 318. Spelm. Glos. 229. Reeves, in his History of the English Law, vol. 1, p. 301, n. (*g*), 2nd

edn., says, that a gift for a term of life or years was called a holding *ad firmam*, and the persons so holding were called *firmarii*: and that *fermo*, in the Italian, signifies a bargain or contract.

(*e*) Theobalds v. Duffoy, 9 Mod. 101. 103. Wind v. Jekyll, 1 P.Wms. 572. 574.

(*f*) Co. Lit. 45, b. 46, a. And see Cotton's case, Godb. 191-2. Rowles v. Mason, 2 Brownl. 197. 4 H. 7. p. 9. pl. 1; and O. Bridgm. by Bann. 7.

(*g*) 2 Bla. Com. 142. 1 Steph. Com. 266.

(*h*) Madox's *Formulare Anglicanum*, No. 239, fol. 140, demise for 80 years, 21 Rich. 2; No. 245, fol. 146, for the like term, A.D. 1429; No. 248, fol. 148, for 50 years, 7 Edw. 4.

An estate for a term of years amounted in legal estimation to a chattel, as distinguished from a freehold interest. It was created without livery of seisin; assigned without that solemnity; was subject to gift by will long before the Statute 32 Hen. 8. c. 1(i); and, on the intestacy of the tenant, whatever might be the length of the term, devolved, with other similar property, on his personal representatives; marks of the inferiority of the tenure which remain uneffaced at the present day. Hence, it bore the distinctive appellation of a chattel real; the term *chattel* serving to denote the quality of the estate in the substance or subject; the word *real* referring to the substance or subject in which that estate existed.

The entry of the lessee perfected his estate in the land; and so long as he performed the duties of a tenant, he had a rightful title during the term against the lord and all claiming under him. Against paramount titles, however, the tenant had no defence; and hence a mode, the offspring of fraud and collusion, was devised of perverting the powerful machinery of the law to the purpose of despoiling him of his possession. A feigned recovery was suffered by the reversioner, at the suit, ostensibly, of a hostile stranger, but, in reality, of a confederate; and involved the destruction of the derivative term for years, the recoveror being deemed to claim under a title superior to that of the recoveree, or lessor, and, of course, entering and evicting the lessee. According to the better opinion, it was not competent to the termor to falsify the recovery; that being a privilege conceded to none but a party having a freehold estate(k). It is true, that he might seek his remedy in a writ of covenant for damages; but they were a poor substitute for the enjoyment of his tenement, improved probably at the cost of great skill, labour, and expense.

(i) Explained by 34 & 35 Hen. 8. c. 5.

(k) Co. Lit. 46, a. 325, a. Butl. n. 1. 2 Inst. 322. Ascough's case, 9 Co. 135, a.

5 Bli. P. C. N. S. 57. See also Flower v. Rigden, Cro. Eliz. 284. Pledgard v. Lake, Cro. Eliz. 718.

Against an evil so serious the statute of Gloucester(*l*) was directed, by providing "that if any man lease his tenement in the City of London for term of years, and he to whom the freehold belongeth causeth himself to be impleaded by collusion, and maketh default after default, or cometh into the court, and giveth it up, for to make the termor lose his term, and the demandant hath his suit, so that the termor may recover by writ of covenant; the mayor and bailiffs may inquire a good inquest, in the presence of the termor and the demandant, whether the demandant moved his plea upon good right that he had, or by collusion, or by fraud to make the termor lose his term; and if it be found by inquest that the demandant moved his plea upon good right that he had, the judgment shall be given forthwith; and if it be found by inquest that he impleaded him by fraud, to put the termor from his term, then shall the termor enjoy his term, and the execution of judgment for the demandant shall be suspended until the term be expired. And in like manner it shall be of equity before the justices in such case, if the termor do challenge it before the judgment."

The confined operation of this statute counteracted in a great measure its object and utility; and several particulars are noticed in which it was defective; among which were, First, Its inapplicability to parol leases, in consequence of the words in the statute, *so that the termor may recover by writ of covenant*; a form of action not maintainable unless the lease were by deed(*m*). Secondly, Its extension to a recovery by default only; and not to a case of feigned pleading(*n*); and Thirdly, The inability of the termor to obtain relief unless he gained information of the recovery, and was received before judgment(*o*). On the whole, the

(*l*) 6 Ed. 1. c. 11. By an amusing error of the press, in Ruffhead's edition of the Statutes at large, this Act is entitled "a feigned robbery against him in the reversion, to make the termor lose his term." In the Statutes of the realm issued by the Record Commissioners, the marginal note is "Feigned

recovery in London against a termor."

(*m*) Co. Lit. 46, a. 2 Inst. 322. 10 E. 3. 45. 7.

(*n*) Co. Lit. 46, a. 2 Inst. 323. 9 E. 3. 30. 45; 9 E. 3. 37. 15; 9 E. 3. 38. 16; 14 H. 3. 4. 4.

(*o*) Co. Lit. 46, a. 2 Inst. 324. Keilw. 92, b. pl. 6.

tenant derived but little advantage from its provisions; but no additional security in this respect was thrown around him until the reign of Henry the 8th, when an effectual check was given to a course of proceeding alike impolitic and unjust, by a statute(*p*), which, after noticing the inconveniences of the then existing law, empowered(*q*) termors, including those holding without writing, as well as those holding by indenture, to falsify, for their terms only, recoveries upon feigned and untrue titles, as a tenant of a freehold might where he was neither privy nor party to the recovery; and declared(*r*) that the termors should hold their terms according to their leases, as if the recoveries had not been suffered; at the same time giving the recoverors the like remedy against the termors for the rents and services, and for waste, as the lessors had.

From this time the estate of tenant for years ranked with that of the freeholder in regard to stability of enjoyment; the judicial records of the country bearing testimony to the frequency of his appeals to justice, and to the protection and support his rightful claims never failed to ensure.

Though his estate has ever retained the brand of its original inferiority, time and a more just appreciation of his position in the community have concurred in levelling many of the distinctions formerly existing between him and the freeholder; and we have seen the leaseholder for years, his tenure being in part his qualification, gradually admitted, under certain conditions and restrictions, to a participation in many important civil rights and functions previously withheld. We find him privileged to kill game(*s*); to serve as a juror(*t*); to act in the commission of the peace(*u*); to exercise the elective franchise(*v*); and even to perform the responsible duties of a

(*p*) 21 Hen. 8. c. 15. *Cooper v. Denne*, *Denne v. Cooper*, 1 Ves. Jun. 565; S. C. 4 Bro. C. C. 30.

(*q*) Sect. 2.

(*r*) Sect. 3.

(*s*) 22 & 23 Car. 2. c. 25, s. 3, now repealed by 1 & 2 W. 4. c. 32.

(*t*) 3 Geo. 2. c. 25, s. 18, repealed by 6 Geo. 4. c. 50, s. 62. And see sect. 1. of the last Act.

(*u*) 5 Geo. 2. c. 18, s. 1, amended by 18 Geo. 2. c. 20.

(*v*) 2 W. 4. c. 45, s. 20.

representative in the Commons House of Parliament (*x*). In addition to which, his estate, through the channels of alienation, settlement, mortgage, and testamentary disposition, may be made subservient to most of the various purposes suggested by interest, necessity, or caprice.

These remarks are applicable only to leases for terms of years.

Leases for lives seem to have originated under the system of the feudal tenures before feuds became hereditary. They conferred a freehold interest, with its concomitant privileges; and in their creation were attended with the solemnities afterwards adapted to the case of a fee-simple. They still retain in legal estimation their superiority as an estate over leases for years; and, until lately (*y*), unless a mode of assurance operating under the statute of uses, or a common law lease and release, were resorted to, or a reversion or remainder were leased for an estate of freehold, a feoffment with livery of seisin was essential to their creation, and, with the same qualifications, to their transfer also.

In attempting to explain the law connected with the subject of these volumes, I shall, after noticing,

- I, The definition and general nature of a lease; and briefly adverting to,
- II, The different properties of a demisable nature; proceed to consider in order,
- III, The contracting parties, and the nature of their contract: showing herein the distinction between an actual lease, and an agreement only for a lease;
- IV, The term of the lease;
- V, The instrument of demise; its essential and formal parts;

(*x*) 1 & 2 Vict. c. 48, s. 2.

(*y*) See 7 & 8 Vict. c. 76, s. 2; and 8 & 9 Vict. c. 106, s. 2.

- VI, The duration of the liability of the parties under their covenants ; and the effect of the transmission by act of law, or alienation by act of the party, of the reversion, or the lease ;
 - VII, The determination of the lease, as well before its regular expiration, as by effluxion of time ; and, after,
 - VIII, Offering a few remarks respecting the preparation ; custody ; stamping ; and registration of leases ; and also respecting indorsements ;
- Finally, add a variety of forms and precedents, which may be referred to as practical illustrations of the law contained in the body of the work, and be rendered available by the draftsman to facilitate the despatch of actual business.



Part the First.

OF THE DEFINITION AND GENERAL NATURE OF A LEASE.

A LEASE at the common law is a grant (*a*) or assurance of a present or future interest, for life, for years, or at will, in lands or other property of a demisable nature, a reversion being left in the party from whom the grant or assurance proceeds (*b*). A pecuniary rent, or other recompense, though not essential to the contract (*c*), is usually reserved, payable yearly, or at other stated times, during the term. The party granting the lease is called the lessor; he to whom it is granted, the lessee. If the instrument be executed by the lessee only, it is not a lease (*d*).

In this definition I have referred to a reversion being left in the lessor as one of the essential conditions of a lease; but this position requires further observation.

An opinion has very generally prevailed that the existence of a reversion is one of the chief characteristics of a lease; and, what amounts to the same thing in different terms, that a transfer of the whole of a lessor's estate in the hereditaments demised operates as an assignment, to the exclusion of a reversion; in proof of which we may refer not only to

(*a*) The word *grant* is here used in its comprehensive or popular sense, and not according to its strict technical import.

(*b*) See as to the necessity for a re-

version, *infra*.

(*c*) Knight's case, 5 Co. 55, a., 1st resolution.

(*d*) Doc dem. Marlow *v.* Wiggins, 4 Q. B. 367; S. C. 3 Ga. & Day. 504.

express judicial decisions (*e*) but to the pages also of various text writers (*f*) who have had occasion to notice the subject. Within the last five-and-twenty years, however, the point has undergone so much discussion, and so irreconcilable are the cases relating to it, that they call for examination with some degree of particularity. And the best plan, perhaps, will be to notice them in chronological order, reserving till the conclusion such remarks as they may seem to require.

In the case of *Hicks v. Downing* (*g*), the distinction between an assignment and an underlease was clearly taken; and it was resolved, that if lessee for years of a house assigned over all his term, and the house were burnt by the negligence of the assignee, no action lay for the assignor against the assignee for this; for the assignor had no residuary interest in the house. So, if lessee for three years assigned his term for four years, or demised the house for four years, he did not by this gain any tortious reversion, and it did but amount to an assignment of his interest. Other early cases are to the same effect (*h*).

Poultney v. Holmes (*i*) appears to be the first case in which a contrary doctrine was broached. The defendant having a term for years, whereof one year and three quarters were to come, agreed with the plaintiff that he should have the premises for the remainder of the term, paying to the defendant the same rent as was reserved upon the original lease. The plaintiff took possession, and brought trespass against the defendant for re-entry. It was objected, that this amounted to an assignment of the lease, and, not

(*e*) See the cases in this and the following pages.

(*f*) Lit. s. 215. Shep. Touch. 266. 2 Bla. Com. 317. Woodf. Landl. & Ten. 53, 3rd ed. by Harrison. 2 Prest. Conv. 125. Flintoff on Real Property, vol. 2, p. 579. Jarm. Prec. by Sweet, vol. 4, p. 517; vol. 5, p. 430. Watk. Conv. Book 2, chap. 4 & 9. 4 Bac. Ab. ed. by Gwil. & Dodd, vol. 4, p. 632. margl. note ||. Davids. Prec. vol. 1, p. 407.

(*g*) *Hicks v. Downing*, alias *Smith v. Baker*, 1 Ld. Raym. 99; S. C. nom.

Hicks v. Downing, 1 Salk. 13.

(*h*) *Wheeler v. Baker*, 3 Salk. 10. *Floyd v. Langfield*, Freem. C. P. 218; S. C., nom. *Loyd v. Langford*, 2 Mod. 174. *Jenison v. Lord Lexington*, 1 P. Wms. 555; S. C. 2 Eq. Ca. Ab. 430, pl. 10. *Anon.*, Mo. 93, pl. 230; and see *Crusoe dem. Blencowe v. Bugby*, 2 Wils. 234; S. C. 2 W. Blac. 766. *Holford v. Hatch*, 1 Dougl. 183. *Kinnersley v. Orpe*, 1 Dougl. 56. *Earl of Derby v. Taylor*, 1 East, 502.

(*i*) *Poultney v. Holmes*, 1 Stra. 405.

being in writing, was void by the statute of frauds; which the plaintiff's counsel answered by saying, that it must be taken as a lease, and not as an assignment, because the reservation was to the lessee, and not to the original lessor, and that the lessee might maintain debt for rent upon it, though he could not distrain for want of a reversion; and of this opinion was the Chief Justice.

But a different decision was pronounced in the case of *Palmer v. Edwards* (*k*). A lessee for a term of years assigned part of the demised premises, at a yearly rent, reserving a power of re-entry on nonpayment. The transfer moreover contained several covenants different from those in the original lease; and it was contended, on the authority of *Poultney v. Holmes*, that for those reasons the instrument did not amount to an assignment; but constituted the assignor the landlord of the assignee. But the Court held that it was an assignment, as there was no reversion left: and, Buller, J., commenting on the case of *Poultney v. Holmes*, remarked, that it only determined that what could not be supported as an assignment should be good as an underlease against the party granting it.

In *Smith v. Mapleback* (*l*), too, where an assignee of a lease for years entered into the following agreement with the lessor: "Agreement between Mr. Smith [the lessor] and Mr. Sellon [the assignee] for the Three Jolly Sailors at Rotherhithe: Mr. Smith to have the house on the terms as mentioned in the lease, and to pay 8*l.* 10*s.* over and above the rent annually, towards the good-will already paid by Mr. Sellon; the Court were clearly inclined to the opinion that this was a transfer of the assignee's whole interest, and not an underlease.

A similar judgment was pronounced in the case of *Parmenter v. Webber* (*m*), where a lessee agreed with A., that he should have the farm during the lease for the same; A. to remain tenant to the lessee during the lease; and the

(*k*) *Palmer v. Edwards*, 1 Dougl. Rep. 441.
187, n.

(*m*) *Parmenter v. Webber*, 8 Taunt.

(*l*) *Smith v. Mapleback*, 1 Term 593; S. C. 2 J. B. Mo. 656.

instrument contained particular provisions as to the terms of holding, and declared that, at the leaving of the farm, A. was to be paid for the fallows and dung ; the instrument being held to operate as an absolute assignment of all the lessee's interest in the farm.

And the same principle was acted on in the case of *Doe v. Bateman* (*n*). The defendant Bateman being possessed of a term of years in the premises in question demised them to Freeman for a term coextensive with his own, reserving rent, and subject to certain conditions ; and no doubt seems to have been entertained that the instrument was an assignment of the whole of Bateman's interest.

Hogan v. Fitzgerald (*o*), determined in Ireland, ranks on the other side. A lessee for three lives by indenture demised part of the lands comprised in his lease to B. for the lives of the same cestuisque vies, with the usual covenants between lessor and lessee. An ejectment by civil bill having been brought against B. for nonpayment of rent, the assistant barrister pronounced a decree for the plaintiff, which being appealed from, the counsel for the defendant in the appeal insisted that the ejectment could not be maintained, inasmuch as no reversion was left in the first lessee ; whereupon the learned judge, Bushe, C. J., reserved the case for the opinion of the judges ; and they held that the plaintiff was entitled to recover, Burton, J., dissentiente, who said that he always considered the ejectment for nonpayment of rent under the statutes, as applicable to rent-service, and not to rent-charge or fee-farm.

The case of the lessee of *Coyne v. Smith* (*p*), in ejectment in Ireland, was similar in its circumstances, and Blackburne, S., contended that the action could not be supported without a reversion ; but he was stopped by the Court, who said that it had been ruled before that this was not a valid objection to

(*n*) *Doe dem. Freeman v. Bateman*,
2 Barn. & Ald. 168.

(*o*) *Hogan v. Fitzgerald*, 1 Huds. &
Br. 77, n. See the remarks of Jebb, J.,

on this case, post, p. 13.

(*p*) Lessee of *Coyne v. Smith*, Bat.
90, n. (*).

the action of ejectment for nonpayment of rent; and that they would not again suffer it to be argued upon a mere point saved; that the ejectment statutes were to be construed in favour of the relation of landlord and tenant, and that there were sufficient grounds for holding this to be a case within the benefit of those statutes.

In *Rankin v. Newsam* (*q*), also an Irish case, a lessee for years, by a deed which purported to be a lease, demised the premises for a term of years exceeding his own; and a question arose as to his right to avow for a distress. Jebb, J., in delivering the judgment of the Court, said, that the instrument avowed upon was, in point of law, an assignment, and not a lease, there being no reversion reserved; and, as it was clear that the avowants had no other title than that, the avowry could not be sustained on the issue joined on the plea of *non tenuit*. *Hogan v. Fitzgerald* being cited for the defendant, Jebb, J., remarked, with respect to that decision there certainly was a difference of opinion among the judges; it was not argued by counsel, and he had no hesitation in saying that he did not consider himself bound by it. And we may here notice that the learned judge again expressed himself to the same effect in the late case of *Fawcett v. Hall* (*r*).

Preece v. Corrie (*s*) came next. A lessee being possessed of the remainder of a term which would expire on the 11th of November, 1826, on the 11th of September in the same year orally let the premises, to hold till the same 11th of November, paying 270*l.* rent immediately. The Court, recognising the authority of *Poultney v. Holmes*, held, that the transaction amounted to a demise, and not to an assignment, though it would not entitle the lessor to distrain.

The question was most elaborately argued in the case of *Pluck v. Digges* (*t*), which occurred in Ireland, and afterwards came before the House of Lords on appeal. A lease having

(*q*) *Rankin v. Newsam*, 1 Huds. & Br. 70.

(*r*) *Fawcett v. Hall*, Ale. & Nap. 248, 253, stated post, p. 16.

(*s*) *Preece v. Corrie*, 5 Bing. 24;

S. C. 2 Mo. & Pa. 57; Best, afterwards Lord Wynford, C. J., presiding.

(*t*) *Pluck v. Digges*, 2 Huds. & Br. 1; S. C., on appeal, D. P., 5 Bl. P. C. N. S. 31; 2 Dow. & Cl. 180.

been granted for three lives, with a covenant for perpetual renewal, the parties claiming under it by indenture released the premises to one Pluck, from whom the plaintiff derived his title, for the same lives as those on which the original lease was held, though this fact did not appear on the face of the deed of release. A rent was reserved, and the deed contained a provision for distress and entry on nonpayment, and a covenant for perpetual renewal, provided that the lives to be added should be the same as those added to the original lease. A distress having been taken for an arrear of rent, upon replevin, the defendants pleaded their title by a general avowry under the Irish statute, 25 Geo. 2. c. 13 (*u*). The Court of Common Pleas decided in favour of the defendants, notwithstanding the plaintiff's argument that he was entitled to a verdict on the plea of *non tenuit*, as it appeared by the evidence that the persons in whose names the defendants had avowed had not any reversion in the premises at the time of making the distress. The case then came on a writ of error before the Irish Exchequer Chamber, where the judgment of the Common Pleas was affirmed by six judges (*x*) against four (*y*); the former maintaining that the release to Pluck operated as a lease, and that a reversion was not necessary to the relation of landlord and tenant; the latter affirming that the deed operated as an assignment, and that the relation of landlord and tenant could not subsist without a reversion. Thence the case was carried to the House of Lords, where the judgment of the Court below was reversed. Lord Ten-terden, after noticing the facts, and the facilities afforded by the statutes to a landlord of avowing without setting forth his title to the land, and speaking of the deed of release as an assignment of the whole interest, observed, that the exemption was not by either of the statutes permitted in the case of a rent-charge on land, payable to a person who had no rever-

(*u*) The 22nd section of the English statute, 11 Geo. 2. c. 19, is similar to the 4th section of the Irish Act.

(*x*) Torrens, J.; Moore, J.; McCle-

land, B.; Smith, B.; O'Grady, C. B.; and Plunket, C. J. C. P.

(*y*) Vandeleur, J.; Jebb, J.; John-son, J.; and Bushe, C. J.

sionary interest in the land ; that the rent in the case before the Court could not be considered as rent-service, or as rent reserved by a landlord, and payable by his tenant ; that there could not be such rent where there was no reversion ; and, therefore, that there was not in the case a rent of the description which came within the provisions of the statute. Lord Wynford concurred in this opinion (z) ; but thought that some legislative measure should be introduced to prevent the failure of the remedy by distress.

Next came *Doe v. Ries* (a), in which the instrument on which the question arose was to the following effect :—Memorandum of an agreement between K. of the one part and P. of the other part. The said K. agrees to let, and the said P. agrees to take, All, &c., for the term of 60 years, or thereabouts, being the whole term that the said K. has the said premises leased unto him ; at the yearly rent or sum of 525*l.*, clear of taxes, &c. ; the said rent to be paid quarterly on the four most usual days of payment of rent ; the first payment to be made for the half quarter at Christmas next. The said P. also agrees to insure the whole of the premises in the Westminster Fire Office in the sum of 5000*l.*, in the joint names of P. and K., or such other name or names as they may appoint. The said lease and counterpart to be prepared by the attorney of the said K., and at the expense of the said P., and to contain all the clauses, covenants, and agreements, that the said K. has entered into and agreed upon in the lease granted unto him of the aforesaid premises. P. to have the benefit of the insurance which has been lately paid, without any charge or expense to himself for the same. And the instrument was held to operate as a demise, although the Court admitted that, as far as the term was concerned, there seemed to have been an intention to assign it. The case of *Pluck v. Digges* was not referred to.

The question arose again in the case of *Thorn v. Wool-*

(z) Hence it may be inferred that the opinion expressed by his lordship in *Preece v. Corrie*, 5 Bing. 24, sup.

p. 13, had undergone a change.

(a) *Doe dem. Pearson v. Ries*, 8 Bing. 178 ; S. C. 1 Mo. & Sc. 259.

combe (*b*), where a lessee for years demised, leased, set, and to farm let, the premises in dispute for a longer term than his own; and Lord Tenterden, C. J., who delivered the judgment of the Court, said, that the deed left no reversion in the lessee; that his entire interest passed by it; and he laid down as a rule, that where that took place the deed operated as an assignment, whatever might be the form of words used in it.

The circumstances of the case of *Fawcett v. Hall* (*c*), which was the next in order of time, were similar to those of *Pluck v. Digges*. A lessee for lives demised the premises to another for the same lives, with the usual clause of a power of distress and entry; the only difference being that the action was ejectment instead of replevin; and the Court were unanimously of opinion, on the authority of *Pluck v. Digges*, and *Rankin v. Newsam*, that a reversion was an essential ingredient in constituting the relation of landlord and tenant: And they also held that there was no substantial distinction between the case of a replevin and an ejectment for nonpayment of rent, with reference to the necessity for a reversion.

Notwithstanding these cases, it was held in *Baker v. Gostling* (*d*), on the authority of *Poultney v. Holmes*, that a demise by a lessee for a longer term than he himself had, reserving a rent, operated as a demise. The point arose only incidentally. It is observable, however, that the Court were apprised of the case of *Thorn v. Woolcombe*; but Tindal, C. J., dismissed it by saying, that it amounted to no more than a decision that where a term was merged in the inheritance, the rent reserved was extinguished. No mention was made of *Rankin v. Newsam*, or *Pluck v. Digges*.

So, in another case in the Irish Exchequer of Pleas (*e*), where a lessee pur autre vie demised the premises to another for the same life, reserving a rent, for nonpayment of which the lessor brought an action of ejectment, though *Pluck v.*

(*b*) *Thorn v. Woolcombe*, 3 Barn. & Adol. 536.

(*c*) *Fawcett v. Hall*, Alc. & Nap. 248.

(*d*) *Baker v. Gostling*, 1 Bing. N. C. 19; S. C. 4 Mo. & Sc. 539.

(*e*) *Lessee of Walsh v. Feely*, Jo. 413.

Digges and *Fawcett v. Hall* were cited, it was held that the action could be maintained; the Court considering that *Pluck v. Digges*, being a case of distress, and not of ejectment, and *Fawcett v. Hall*, as founded upon it, did not affect the case before them.

In the next case (*f*) on the subject, where the form of action was *covenant*, the circumstances were similar to those in *Baker v. Gostling*. An assignee of a lease professed to demise, lease, set, and to farm let, part of the premises for a term exceeding his own; and Tindal, C. J., in delivering the judgment of the Court, used the following strong terms:—"The only question, therefore, is, whether, if lessee for ninety-nine years demises for a longer term, such demise operates in law as an assignment. And we entertain no doubt but that, for a very long period, the law has been held that it has such operation, and may be so treated in pleading. The resolution of the Court in *Hicks v. Downing*, 1 Ld. Raym. 99, is in point." His Lordship also referred, for the same conclusion, to *Palmer v. Edwards*, and *Parmenter v. Webber*. This decision is the more important from *Poultney v. Holmes*, *Preece v. Corrie*, and *Baker v. Gostling*, being cited by the counsel for the defendant, who maintained that the instrument operated as an underlease.

Sir Edward Sugden, C., also lately stated (*g*) that a sub-demise by a lessee for lives for the same lives left no reversion in the lessor, and, consequently, that the rent reserved was not a rent within the Acts enabling landlords to avow generally for their rent.

In addition, we may mention that the authority of *Poultney v. Holmes* was strongly assailed by Parke, B. in the late case of *Barrett v. Rolph* (*h*). The learned Baron declared that it certainly could not be supported on the ground of the reserva-

(*f*) *Wollaston v. Hakewill*, 3 Scott's N. R. 593, 616. And see *Pascoe v. Pascoe*, 3 Bing. N. C. 398; S. C. 5 Scott, 117.

(*g*) *Fitzgerald v. O'Connell*, 1 Jo. & La Tou. Ir. Ch. 134. 156.

(*h*) *Barrett v. Rolph*, 14 Mees. & Wel. 348. 352.

tion of rent:—that it was certainly of very doubtful authority:—that it was very questionable whether it was good law, especially since the decision in the Court of Common Pleas in *Parmenter v. Webber*;—and that it was very difficult to say that, because an instrument was by parol, and therefore could not operate as an assignment, it was to be construed to give less interest than the parties intended. He considered that that doctrine could not be sustained.

From this statement of the cases, the difference of opinion on the subject will be obvious. To sum them up, it appears that, in favour of the doctrine of an instrument passing all a lessor's estate being construed as a demise, and of a lease being good without a reversion in the lessor, are the following cases:—1. *Poultney v. Holmes*; 2. *Hogan v. Fitzgerald*, in which the Court were not unanimous; and of which the authority has been twice denied by *Jebb, J.*; 3. The lessee of *Coyne v. Smith*, where the Court stopped the argument of counsel opposed to that view; 4. *Preece v. Corrie*, coupled with the qualifying circumstance of Lord Wynford's subsequently concurring in the reversal of the judgment in *Pluck v. Digges*, which was opposed in doctrine to *Preece v. Corrie*; 5. *Doe dem. Pearson v. Ries*, in which the Court adverted to the apparent intention, as far as the term was concerned, to effect an assignment; 6. *Baker v. Gostling*, where the point under discussion was only incidentally raised; in addition to which *Tindal, C.J.*, afterwards concurred in the opposing case of *Wollaston v. Hakewill*; and, 7. The lessee of *Walsh v. Feely*. On the other hand, we find declaring that a lease cannot subsist without a reversion, and that a transfer of the whole of the lessor's interest operates as an assignment; 1. *Hicks v. Downing*; 2. *Palmer v. Edwards*; 3. *Smith v. Mapleback*; 4. *Parmenter v. Webber*; 5. *Doe dem. Freeman v. Bateman*; 6. *Rankin v. Newsam*; 7. *Pluck v. Digges*, decided in the highest court of appeal; 8. *Thorn v. Woolcombe*; 9. *Fawcett v. Hall*; 10. *Wollaston v. Hakewill*; 11. the declaration of Sir E. Sugden in *Fitzgerald v. O'Connell*; and, 12. Mr. Baron Parke's censure of *Poultney v. Holmes*; not to advert

particularly to those referred to in a former page (*i*); from all which it is not, perhaps, too much to conclude that a reversion is essential to a lease; and under these circumstances I have not hesitated, in the definition of a lease (*k*), to speak of a reversion as a condition indispensable to its existence; and we may also conclude that, where all the grantor's estate is transferred, the instrument will operate as an assignment notwithstanding the reservation of a rent to the grantor, or a right of re-entry on nonpayment, or on the nonperformance by the grantee of covenants contained in it, and although words of demise be used instead of words of assignment.

It is clear that if a tenant from year to year demises for a term of years, and the original tenancy from year to year lasts beyond that term, such a demise is not an assignment, but there is a reversion, on which an action of covenant may be maintained (*l*).

In connection with this subject we may notice the case of *Hartshorne v. Watson* (*m*). A., an assignee of a lease for years, entered into an agreement with B., whereby he, A., agreed, in consideration and on payment of the sum of 200*l*. and interest at the times and in the manner mentioned in a warrant of attorney bearing even date therewith, to assign unto the said B., his executors, administrators, and assigns, at his or their request, costs, and charges, the said lease; to hold the same to B., his executors, administrators, and assigns, for the term of eleven years from Lady-day then last, being the residue of the term in the indenture of lease demised, at the yearly rent of 100*l*., and under and subject to the covenants, provisoes, and agreements, in the indenture of lease contained; and the said B. agreed to accept the said lease on payment of the sum of 200*l*. and interest; and in the mean-

(*i*) Ante, p. 10, n. (*h*).

(*k*) Ante, p. 9. See also a note on this subject in 5 Man. & Ry. 157.

(*l*) Oxley v. James, 13 Mees. & Wel. 209. Pike v. Eyre, 9 Barn. & Cres.

909; S. C. 4 Man. & Ry. 661. Curtis v. Wheeler, Mood. & Malk. 493.

(*m*) *Hartshorne v. Watson*, 5 Bing. N. C. 477; S. C. 7 Scott, 494; 2 Arn. 70.

time and until such assignment should be made well and truly to pay the rent, and perform the covenants, conditions, and agreements, in the said indenture of lease contained, and of and from the same to save harmless and keep indemnified the said A., his executors, administrators, and assigns; and it was thereby agreed that, in case default should be made in payment of all, or any, or either of the instalments mentioned in the said warrant of attorney, A. should be at liberty to re-enter, and to enjoy the said premises as in his former estate. The instrument was construed to be an agreement to assign, and not an assignment, as it was clearly not to receive its effect from the consideration of a promised payment, but only from the actual payment of the 200*l.*, A. retaining a hold on the premises by way of security in the meantime.

According to Lord Coke⁽ⁿ⁾, the term *lease* is derived from the Saxon word *leapum* or *leasum*, for that the lessee cometh in by lawful means. It is clear that even before the late act of 8 & 9 Vict., c. 106^(o), a lease for years could not be gained otherwise^(p); it was an innocent conveyance, and if made by a stranger would not amount to a disseisin in fact, without a forcible entry by the lessee, or an avowed intention to dis-seise^(q): if made by a tenant for a period which might exceed his own estate, as if one possessed of a term for twenty years granted for nineteen to commence after his death; or for a term of years which must exceed his own^(r), as if one possessed of a term for three years granted it for four; it occasioned no interruption of the title to the freehold, and consequently did not work a forfeiture^(s), not even if made by lessee at will, unless the lord elected to treat it as a

(n) Co. Lit. 43, b.

(o) 8 & 9 Vict. c. 106, which provided, sect. 2, that a feoffment made after the 1st of Oct. 1845 shall not have any tortious operation. It repealed 7 & 8 Vict. c. 76.

(p) Helyar's case, 6 Co. 24, b.

(q) Jerritt v. Weare, 3 Price, 575.

(r) Stonfil v. Hicks, Holt, 414; S. C.

2 Salk. 413. Eastcourt v. Weeks, 1 Salk. 187. Gree v. Studley, cited, Holt, 414. Roe, or Rowe, v. Williamson, 2 Lev. 140; S. C. 3 Keb. 490; Freem. 400. Hicks v. Downing, alias Smith v. Baker, 1 Ld. Raym. 99.

(s) Hicks v. Downing, sup. Eastcourt v. Weeks, sup. And see Wood v. Reingold, Cro. Eliz. 764, 854.

disseisin(*t*). Upon the same principle, and the law was the same before the enabling statute(*u*), a lease for years by tenant in tail, as it conveyed no more than could be rightfully conveyed, did not operate as a discontinuance(*x*).

A lease, however, for life or years will operate as a revocation of a devise to the extent of the estate comprised in the lease, whether it be granted to a stranger or the devisee himself, provided, in the latter case, that it begin immediately, or futurely in the testator's lifetime, as it may then determine before his death(*y*); but a lease granted by a testator to his devisee of the lands devised, for a term to commence after the testator's death, will effect a total revocation of the devise, although the lease be delivered to a stranger to the use of the devisee, and the stranger do not deliver it to the devisee till after the testator's death, and although the devisee never agree to it; for the impossibility of both estates subsisting together affords evidence of an alteration of the testator's intention(*z*).

So, a lease on which a rent is reserved will revoke a voluntary conveyance within the Statute, 27 Eliz. c. 4, whether a gross sum be paid by way of consideration or not(*a*).

A demise of land empowers the lessee to work open mines; though he cannot open new ones without being guilty of waste(*b*); but if the demise be of land and all mines therein, and no mine be open at the time, the lessee may open a

(*t*) *Powseley*, or *Pouseley*, *v. Blackman*, or *Blakeman*, Cro. Jac. 659; Palm. 201; 2 Rol. 284; S. C., nom. *Ponesley v. Blackman*, J. Bridg. 12; cited, Latch, 53. *Fisher's case*, Latch, 75. Lit. s. 583. 3 Mod. 196. *Blunden v. Baugh*, Cro. Car. 302; S. C. W. Jo. 315.

(*u*) 32 Hen. 8. c. 28.

(*x*) Lit. s. 622. See also *Baker v. Hucking*, Hutt. 126. The law of discontinuance was abolished for almost all practical purposes by the late statute of limitations, 3 & 4 W. 4. c. 27, s. 39.

(*y*) *Sheers v. Lammis*, 11 Mod. 365. *Croke v. Bullock*, Cro. Jac. 49; *Hodge-*

skins v. Whood, Cro. Jac. 690; S. C., nom. *Hodgkinsonne v. Whood*, Cro. Car. 23. *Perkins v. Walker*, 1 Vern. 97. *Cave v. Holford*, 3 Ves. 653.

(*z*) Ibid.

(*a*) *Cross v. Faustenditch*, Cro. Jac. 180.

(*b*) *Saunder's case*, 5 Co. 12, a.; S. C., nom. *Saunders v. Marwood*, 1 Brownl. 241. Co. Lit. 54, b. *Astry v. Ballard*, 2 Mod. 193; S. C. 2 Lev. 185; Freem. K. B. 444; S. C., nom. *Astree v. Ballard*, T. Jo. 71; S. C. 3 Keb. 709, 723, 761, 765, 766, 776. The writ of waste was abolished by the statute, 3 & 4 W. 4. c. 27, s. 36.

mine(c); if, however, the demise be of land and mines, some being open, and others not open at the time, the close mines will not pass(d).

There is reason to suppose that an implied trust cannot subsist between a lessor and lessee; because every lessee is a purchaser by his contract and covenants, which seem to exclude all implication of a trust for the lessor; and, therefore, if in that case there be any trust at all, it is apprehended that it must be in writing(e).

If the lease be but for half a year, or a quarter, or any less time, the lessee is respected as tenant for years, and is styled so in some legal proceedings, a year being the shortest term of which the law in this case takes notice(f). The estate of lessee for years is called a term, *terminus*, because its duration or continuance is bounded, limited, and determined; for every such estate must have a certain beginning and a certain end(g).

A lease for years must be perfected by the entry of the lessee(h); a lease for life made before the 1st of October, 1845(i), by livery of seisin(k). Before entry, the whole estate remains in the lessor(l), the lessee for years having in strictness no estate, but merely a right, denominated an *interesse termini*(m), which, though assignable(n), cannot be the foundation for a release by way of enlargement from the

(c) Saunder's case, 5 Co. 12, a.; S. C., nom. *Saunders v. Marwood*, 1 Brownl. 241. Co. Lit. 54, b. *Astry v. Ballard*, 2 Mod. 193; S. C. 2 Lev. 185; Freem. K. B. 444; S. C., nom. *Astree v. Ballard*, T. Jo. 71; S. C. 3 Keb. 709. 723. 761. 765. 766. 776.

(d) *Astry v. Ballard*, sup. Co. Lit. 54, b.

(e) *Pilkington v. Bayley*, 7 Bro. P. C. 526; Toml. ed. vol. 7, p. 333; MS. Journ. *sub anno* 1777-8, p. 112.

(f) 2 Bla. Com. 140. Lit. s. 67. Co. Lit. 54, b.

(g) 2 Bla. Com. 143. Co. Lit. 45, b.

(h) Lit. ss. 58, 66. 2 Bla. Com. 144. O. Bridgm. by Bann. 199. Wil-

liams v. Bosanquet, 1 Brod. & Bing. 238, 256; S. C. 3 J. B. Mo. 500.

(i) 8 & 9 Vict. c. 106, s. 2.

(k) Lit. s. 59. Co. Lit. 48, a.

(l) Co. Lit. 46, b. 270, a. Doe dem. *Rawlings v. Walker*, 5 Barn. & Cres. 111, 118; S. C. 7 Dow. & Ry. 487.

(m) 2 Bla. Com. 144. The expression *interesse termini* is also used to denote the interest of a lessee in a term that is to commence in future. *Copeland v. Stephens*, 1 Barn. & Ald. 593, 606. Doe dem. *Rawlings v. Walker*, sup.

(n) Co. Lit. 46, b. *Saffyn's case*, 5 Co. 123, b.; S. C., nom. *Saffyn v. Adams*, Cro. Jac. 60. *Wheeler v.*

lessor (*o*), nor will it qualify the owner to maintain an action of trespass (*p*), or ejectment (*q*). Even a lessee by bargain and sale under the statute of uses cannot maintain trespass till entry (*r*). The lessee may enter notwithstanding the death of the lessor during the term, whether he, the lessor, be sole or joint tenant (*s*). After the lessee's entry, the deed becomes available from the time of its execution (*t*), and the lessee the absolute owner of the premises for the term granted (*u*).

The lessee's entry, however, in the case of a lease for years, is not necessary to entitle the lessor to sue for rent; as rent becomes due by the lease, and not by the entry; and, therefore, he need not aver occupation; but it is otherwise in the case of a lease at will, where the rent is only due in respect of occupation (*x*).

We now proceed to consider the lease with reference to the subjects of demise.

Thorogood, Cro. Eliz. 127; S. C., nom.
Wheeler v. Twogood, 1 Leon. 118.
Bruerton v. Rainsford, Cro. Eliz. 15.
Copeland v. Stephens, sup.

(*o*) Saffyn's case, sup. Lit. s. 459.
Co. Lit. 46, b. 270, a.

(*p*) Plowd 133, cites 22 E. 4. 13.
14. Bro. Trespass, 365. 5 Mod. 384.
And see Plowd. 142. 37 H. 6. 18, a.
Saffyn's case, or Saffyn v. Adams, sup.
Wheeler v. Montefiore, 2 Q. B. 133.
142; S. C. 1 Ga. & Dav. 493. Doe
dem. Parsley v. Day, 2 Q. B. 147. 156;
S. C. 2 Ga. & Dav. 757.

(*q*) Saffyn's case, or Saffyn v. Adams,
sup.

(*r*) Lutwich v. Mitton, Cro. Jac. 604.

Barker v. Keat, 2 Mod. 249. 251.
Geary v. Bearcroft, Cart. 57. 66.

(*s*) Lit. s. 66. Copeland v. Stephens,
1 Barn. & Ald. 593. 606.

(*t*) Copeland v. Stephens, sup.

(*u*) Raine v. Alderson, 6 Scott, 691.
699; S. C. 4 Bing. N. C. 702; 1 Arn.
329.

(*x*) Rushden's case, 1 Dy. 4, b.,
cites 18 H. 6. 1. A. Bellasis v. Bur-
brick, or Burbriche, Holt, 199; 1 Salk.
209; 1 Ld. Raym. 170. Anon., 1 Vent.
41. Anon., 4 Leon. 17. 18. Jeakill
v. Linne, Hetl. 54. Anon., Dal. 44.
pl. 30. Williams v. Bosanquet, 1
Brod. & Bing. 238. 257; S. C. 3 J. B.
Mo. 500.

Part the Second.

OF THE SUBJECTS OF DEMISE.

THE subjects of demise are various, and, generally speaking, comprehend incorporeal as well as corporeal hereditaments (*a*). Thus, not only land, but advowsons (*b*), corodies (*c*), estovers (*d*), ferries (*e*), fisheries (*f*), franchises (*g*), rights of common (*h*), rights of herbage (*i*), rights of way (*k*), tithes (*l*), tolls (*m*), and other things of a similar kind, may be leased for lives or years.

(*a*) *Shep. Touch.* 268.

(*b*) *Anon.*, 3 Dy. 323, b. pl. (30).

(*c*) *Bro. Ab. tit. Leases*, 40. *Bacon on Leases*, 8.

(*d*) *Ibid.*

(*e*) *Rex v. Nicholson*, 12 East, 330. *Peter v. Kendal*, 6 Barn. & Cres. 703.

(*f*) *The Bishop of Winchester v. Wright*, 2 Ld. Raym. 1056. *The Duke of Somerset v. Fogwell*, 5 Barn. & Cres. 375; S. C. 3 Dow. & Ry. 747.

(*g*) *The Duke of Somerset v. Fogwell*, *sup.*

(*h*) *Sury v. Brown*, Latch, 99.

(*i*) *Tottel v. Howell*, Noy, 54. 17 E. 4. 6. *Sury v. Brown*, *sup.* *Hill v. Barry*, Hay. & Jo. 68B.

(*k*) *Newmarch v. Brandling*, 3 Swanst. 99. *Osborn v. Wise*, 7 Car. & Pa. 761.

(*l*) *Bally v. Wells*, Wiln. 341; S. C. 3 Wils. 25. *The Dean and Chapter of Windsor v. Gover*, 2 Saund. 302. *Bousher v. Morgan*, 2 Anstr. 404. *Brewer v. Hill*, 2 Anstr. 413. *Cox v.*

Brain, 3 Taunt. 95. And see 6 & 7 W. 4. c. 71, An Act for commutation of tithes, in England and Wales, by the 88th section of which the lessee in occupation of tithes commuted under the act is empowered to surrender and make void his lease, so far as it may relate to the tithes; and the commissioners are empowered to direct what compensation shall be given to the immediate lessor, and what allowances shall be made by the lessee, in consideration of the nonfulfilment of any conditions contained in the lease, and what deductions shall be made from the rent thenceforth payable in respect of the hereditaments included in the lease.

(*m*) *Oldroyd v. Crampton*, 4 Bing. N. C. 24. *Bridgland v. Shapter*, 5 Mees. & Wel. 375. *Harris v. Morrice*, 10 Mees. & Wel. 260. *Walker v. Richardson*, 2 Mees. & Wel. 382.

A demise of minerals before they are won is a demise of the realty (*u*).

Offices merely ministerial are also subjects of demise ; and our early reports give examples of leases of the office of printing (*o*), of post-master (*p*), of registership of policies of assurance in London (*q*), of aulnager (*r*), and of teller of the Exchequer (*s*) ; and the case of *Veale v. Priour* (*t*) refers to other precedents of offices granted for years ; first, of those concerning the safety of a realm ; as the office of havenor, *i. e.*, warden of a haven or port, by K. Hen. 6 ; of gun founder, 1 Car. 1 ; of making gunpowder, by King Charles the 2nd ; secondly, of those concerning the trade of the realm ; as 1 H. 7, of exchange of money ; 18 H. 8, of gager ; and of the letter office in the time of Charles the First. Lord Hardwicke also admitted that the office of taking care of the palace and house of lords might be granted to one and his executors and administrators for a term of terms (*u*).

But it has been held that a lease of the office of marshal of the King's Bench (*x*), being an office of trust annexed to the person, and concerning the administration of justice, could not be granted for a term of years certain ; for the trust being individual and personal could not be extended to the executor or administrator of the officer, which would otherwise be the case in the

(*u*) *Doe dem. Morgan v. Powell*, 3 Scott's N. R. 687. 693.

(*o*) Hardr. 352.

(*p*) Ibid.

(*q*) *Veale v. Priour*, Hardr. 351.

(*r*) *Northcote v. Ward*, 3 Dy. 303, a. *Veale v. Priour*, Hardr. 354. 4 Hen. 4. c. 24.

(*s*) *Squib v. —*, cited 1 Vern. 10. 12. The office of teller of the Exchequer was abolished by 4 & 5 W. 4. c. 15, s. 1.

(*t*) Hardr. 351. 354.

(*u*) *Schellinger v. Blackerby*, 1 Ves. 346. The farming out of customs hath been anciently used by our Kings. Thus, Edward 3. let the new and

old customs of London for 10,000 marks monthly, to be paid into the wardrobe. The like was done in the 17th year of Rich. 2. *anno* 20, who let out for term of life the subsidy of cloth in divers countries. And Edward 4. *anno* 1, the subsidy and ulnage of cloth. Thus did H. 8. with his customs, and since his time the late Queen, and our now Sovereign, [*i. e.*, William the Third.] Note by C.J. Treby to *Northcote v. Ward*, 3 Dy. 303, a.

(*x*) After the next vacancy the person having the custody of the prison is to be called the Keeper of the Queen's Prison. 5 Vict. sess. 2, c. 22, s. 22.

event of his death during the term (*y*). So we find that the office of *custos brevium* (*z*), of *chirographer* (*a*), of the clerk of the pipe (*b*), of the Queen's remembrancer in the Exchequer (*c*), of the clerk of the crown of the court of Queen's Bench (*d*), of steward of an honor comprising a court leet (*e*), of garbler of the city of London (*f*), and, it seems (*g*), of keeper of the Gate-house prison in Westminster, could not be leased for any certain term of years. Though the same objection was held not to apply to a lease at will, or for the officer's life (*h*), or for a term of years determinable with his life (*i*).

Examples, however, are not wanting of grants for years certain of some offices connected with the administration of justice, as that of coroner and sheriff till the statute 14 Ed. 3. c. 7 (*k*), of surveyor of the green wax (*l*), and of the six-penny writs in Chancery, and subpœnas in C. B. and B.R. (*m*), of controller of sealing writs (*n*), and of making out process in C. B. (*o*).

Chattels, such as farming implements and furniture (*p*), may also be demised. So may a flock of sheep or other live

(*y*) Reynel's case, 9 Co. 95, a. Meade v. Lenthall, Cro. Car. 587; S. C. W. Jo. 463. Sutton's case, 6 Mod. 57. See also 5 & 6 E. 6. c. 16; and Ellis v. Ruddle, 2 Lev. 151; S. C., nom. Ellis v. Audle, 3 Keb. 552; and 27 Geo. 2. c. 17, s. 9.

(*z*) Reynel's case, sup. This office was abolished by 7 W. 4 & 1 Vict. c. 30, s. 1.

(*a*) Reynel's case, sup. This office was abolished by 5 & 6 W. 4. c. 82, s. 1.

(*b*) Reynel's case, sup. Office in England abolished by 3 & 4 W. 4. c. 99, s. 41, and in Scotland by 4 W. 4. c. 16, s. 1.

(*c*) Reynel's case, sup.

(*d*) Ibid. Also called Master of the Crown Office, and Queen's Coroner and Attorney, see 6 Vict. c. 20.

(*e*) Howard v. Wood, 2 Lev. 245; S. C. T. Jo. 126. But see Hardr. 354.

(*f*) Jones v. Clerk, Hardr. 46; cited by Hale, C. B., Hardr. 353. Hob. 153. And see The Mayor and Commonalty of London v. Hatton, Sty. 357.

(*g*) Rex v. Lady Braughton, or Broughton, 3 Keb. 32; S. C. 2 Lev. 71; T. Raym. 216. But see Progers v. Lady Fraser, 2 Ca. in Ch. 70; S. C., nom. Progers v. Phrazier, 1 Vern. 9.

(*h*) Jones v. Clerk, sup.

(*i*) Howard v. Wood, sup.

(*k*) Veale v. Priour, Hardr. 351, 354.

(*l*) Office abolished by 3 & 4 W. 4. c. 99, s. 41.

(*m*) Veale v. Priour, sup.

(*n*) Ibid.

(*o*) Ibid.

(*p*) Bacon on Leases, 7. Bac. Ab. tit. Leases, (A). Collins v. Harding, Cro. Eliz. 606, 622. Newman v. Anderton, 2 New Rep. 224.

animals (*q*). The lessee is entitled to the use and profit of them during the term, but he cannot destroy, kill, sell, or give them away, without, it seems, exposing himself to an action of trespass (*r*). The property of such animals as may die during the term belongs to the lessee; and hence the lessor has not such a reversion as can be granted over either during the demise, or in the interval between its determination and the redelivery of the sheep (*s*). He has only a possibility of property in case they outlive the term (*t*). The young ones belong absolutely to the lessee, as profits arising and severed from the principal (*u*).

Though the sum payable in respect of a lease of an advowson, or the like, has acquired the denomination of a rent, yet, in strictness, a rent cannot be reserved out of an incorporeal hereditament (*x*). The sum reserved may be recoverable on the express covenant for payment, or on the *reddendum*, which amounts to an implied covenant (*y*); but will not warrant a distress (*z*).

It is right to apprise the reader, that, in this treatise, leases of incorporeal hereditaments, goods, and the like, are only incidentally touched upon, when they present any peculiar feature of distinction, or serve the purpose of illustration, my chief design being to attempt an explanation of the law as it relates to leases of corporeal hereditaments.

(*q*) Ibid. Spencer's case, 5 Co. 16, b. Wood v. Foster, 1 Leon. 42; S. C., nom. Wood v. Ash, Godb. 112; Ow. 139. Emott v. Cole, Cro. Eliz. 255. Billingsley v. Hersey, 2 Bulstr. 5. 7. Richards Le Taverner's case, Dy. 56, a. pl. (15). Dormer v. Clerk, Dy. 110, a. pl. (39). Newman v. Anderton, sup. Walsh v. Pemberton, Selw. N. P. 603, 7th ed.

(*r*) Ibid. Lit. s. 71.

(*s*) Bacon on Leases, 7. Bac. Ab. tit. Leases, (A). Wood v. Foster,

Wood v. Ash, sup.

(*t*) Ibid.

(*u*) Ibid.

(*x*) Lovelace v. Reynolds, Noy, 59. 60. Co. Lit. 47, a. Gardiner v. Williamson, 2 Barn. & Adol. 336. Neale v. Mackenzie, 2 Crompt. Mees. & Ros. 34; S. C. in error, where the judgment of the Court below was reversed, 1 Mees. & Wel. 747.

(*y*) See as to the *Reddendum*, Part v. chap. viii. post.

(*z*) Gardiner v. Williamson, sup.

Part the Third.

OF THE CONTRACTING PARTIES; AND OF THEIR CONTRACT OR AGREEMENT.

CHAPTER I.

WHO MAY BE LESSORS.

SECTION I.—WITH REFERENCE TO PERSONAL CAPACITY.

1.—*Infants.*

CONSIDERABLE confusion prevails in the books on the subject of infants' leases for years at common law. Some of the authorities expressly or inferentially show them to be voidable only if they reserve a rent (*a*), but void if they do not (*b*), or if they only reserve a rent of no value, such as a rose, a peppercorn, a penny, or other trifle (*c*). Some express a doubt on the subject (*d*). Some, without allusion to the

(*a*) 7 E. 4. 6. pl. 16. 18 E. 4. 1. pl. 7. *Lane v. Cowper*, Mo. 105, 7th point; S. P. and S. C., nom. *Humphreston's case*, 2 Leon. 216, Gawdy, J., *dissent*. *Forrester's case*, 1 Sid. 42; S. C., nom. *Gable v. Forester*, 1 Keb. 1. 1 Rol. 19. (15). *Davies v. Manington*, 2 Sid. 109. *Smith, or Smyth, v. Bowen*, or *Bowin*, 1 Mod. 25; S. C. 1 Vent. 51; 2 Keb. 531. *Anon.* 3 Salk. 196. *Ashfield v. Ashfield*, W. Jo. 157; S. C.

Latch, 199; *Godb.* 364; *Noy*, 92; *Bendl*, 188. *Argo*. Hutt. 102. 1 Rol. 441. 3 P. Wms. 209.

(*b*) *Lane v. Cowper*, *sup.* *Humphreston's case*, *sup.* *Anon.* 3 Salk. 196. *Anon.* Hutt. 102.

(*c*) *Humphreston's case*, 2 Leon. 217. 1 Mod. 263. *Fitzh. Abr. tit. Entre Congeable*, 26.

(*d*) *Per Glyn*, in *Davies v. Manington*, 2 Sid. 110.

distinction between rent and no rent, simply declare that they are voidable (*e*). Others assert or imply that they are voidable only though no rent be reserved (*f*). Others, again, make a difference between ordinary leases, and leases made for the purpose of trying titles, and state that the latter require no reservation of rent for their support (*g*); while from two or three dicta (*h*) we might infer that an infant's deed is in no case good.

From this mass of irreconcilable confusion the law was to a certain degree rescued by the Court of King's Bench in the case of *Zouch v. Parsons* (*i*), where Lord Mansfield, who delivered the judgment of the Court, after remarking generally, "that it was not settled what was the true ground upon which an infant's deed was voidable only; whether the solemnity of the instrument was sufficient, or it depended upon the semblance of benefit to the infant, from the matter of the deed upon the face of it," proceeded, with reference to the lease being void where no rent was reserved, to observe:—"There are many obiter sayings, but there is no sufficient authority clearly to outweigh the reasons against this position. I cannot find a case adjudged singly on this ground. What looks most like an authority is the opinion of Wray and Southcote against Gawdy in *Humphreston's* case, 16 Eliz. Moore, 105 (*k*), and 2 Leon. 216; but there the judgment was upon the right and merits of the case, and not upon the point of the lease.

(*e*) Lit. s. 547. Co. Lit. 45, b, 308, a. 9 H. 7, 24, pl. 7. Cont. Co. Lit. 273, a.

(*f*) Per Gawdy, J., in *Humphreston's* case, 2 Leon. 216. *Kirton v. Elliott*, 2 Bulstr. 69.

(*g*) Per Gawdy, J., in *Humphreston's* case, 2 Leon. 217. *Davies v. Manington*, 2 Sid. 110. Anon. 3 Salk. 196. *Rames v. Machin*, Noy, 130. *Zouch dem. Abbot v. Parsons*, 3 Burr. 1806. And see *Noke v. Windham*, Stra. 694. *Throgmorton dem. Miller v. Smith*, Stra. 932. *Birchman v. No-right*, Cunn. 54. Anon. Cowp. 128.

(*h*) See Coke's observation on the

argument of *Warren v. Smith*, Cro. Jac. 364. *Smith v. Low*, 1 Atk. 490. *Pigot v. Garnish*, Cro. Eliz. 678. 734. *Jennings v. Bragg*, Cro. Eliz. 446-7; cited, 3 Co. 35, b.

(*i*) *Zouch dem. Abbot v. Parsons*, 3 Burr. 1794; S. C. 1 W. Blac. 575. In the late case of *Allen v. Allen*, 4 Irish Eq. Rep. 472, Sir Edward Sugden, C., observed, p. 491, that the case of a lease with a reservation of rent showed that at least some instruments executed by infants were voidable.

(*k*) i. e. Mo. 103, nom. Lane v. Cowper.

The question as to the lease arose upon the fictitious lease to try the infant lessor of the plaintiff's title in ejectment. The two, Wray and Southcote, held that, no rent being reserved, there was no semblance of benefit to the infant; whereas, in truth, it was greatly for his benefit. The objection was turning his own privilege of infancy against him to bar his recovering; besides the lease was by parol. But reason soon prevailed, and it has been long settled, that an infant may make a lease without rent to try his title. Very prejudicial leases may be made though a nominal rent be reserved; and there may be most beneficial considerations for a lease, though no rent be reserved. What seems decisive is, that the lessee can in no case avoid the lease on account of the infancy of the lessor, which shows it not to be void, but voidable only. And it is better for infants that they should have an election."

These words, particularly when connected with other expressions in the judgment, seem to import that an infant's lease is in no case void; but it is afterwards stated, "that if a new case should arise where it would be more beneficial to the infant that the deed should be considered as void, for instance, if he might incur a forfeiture, or be subject to damages, or a breach of trust in respect of a third person, unless it was deemed void, the reason of the privilege in infancy would warrant an exception in such case to the general rule" (*l*); thus discarding the former distinction between rent and no rent, and founding the doctrine on the more doubtful test of the lease being beneficial to the infant (*m*).

Mr. Justice Buller, indeed, advanced a step further; and, observing that all the modern cases had expressly held that

(*l*) 3 Burr. 1807-8. 1 W. Blac. 579. And see *Baylis v. Dineley*, 3 Man. & Selw. 477, 481.

(*m*) In 1 Eq. Ca. Ab. 280. pl. 1, marg., Lord Holt is stated to have said in his argument of the case of *Lord Falkland v. Bertie*, 2 Vern. 342, that the Court of Chancery would de-

erree building leases for 60 years of infants' estates where it appeared to be for their good. On reference, however, to *Vernon*, I cannot find the proposition. *Cecil v. Salisbury*, 2 Vern. 224-5, is, without doubt, the case intended.

an infant could not avoid a lease which was for his own benefit, freely owned himself of the same opinion (*n*). “Lord Mansfield,” said he, “in the case of *Drury v. Drury* (*o*), laid it down as a general principle, that if an agreement be for the benefit of an infant it shall bind him; and Lord Hardwicke afterwards adopted this rule.” But, notwithstanding Mr. Justice Buller’s remarks, it seems to be the prevailing opinion of the profession that the infant is never precluded from disputing the lease on attaining twenty-one (*p*); an opinion fortified by the fact of the lessee’s inability to avoid the lease in any case on account of the infancy of the lessor (*q*), and the inadmissibility of the infant’s plea of *non est factum* (*r*).

Notwithstanding a passage to the contrary in Coke (*s*), it appears that an infant’s lease for life or lives made by feoffment and personal livery of seisin, whether containing a reservation of rent or not, or beneficial or disadvantageous to him, is voidable only (*t*). The infant may enter during his infancy to revest his possessory right for the sake of the profits, and elect to confirm the feoffment on attaining his majority (*u*).

A lease by livery derived through the medium of a power of attorney given by an infant is inoperative (*x*).

(*n*) *Maddon dem. Baker v. White*, 2 Term Rep. 159. 161.

(*o*) 5 Bro. P. C. 570; Toml. Ed. vol. 3, p. 492, being the case of the Earl of Buckingham *v. Drury*.

(*p*) 2 Prest. Conv. 243.

(*q*) *Forester’s case*, 1 Sid. 42; S. C. 1 Keb. 1. *Davies v. Manington*, 2 Sid. 109. *Smith, or Smyth, v. Bowen, or Bowin*, 1 Mod. 25; S. C. 1 Vent. 51; 2 Keb. 581. *Zouch dem. Abbot v. Parsons*, 3 Burr. 1806. And see *Shannon v. Bradstreet*, 1 Scho. & Lef. 58. *Farneham v. Atkins*, 1 Sid. 446. *Haw v. Ogle*, 4 Taunt. 10.

(*r*) 5 Co. 119, a. *Cro. Eliz.* 127. *Thompson v. Leach*, Holt, 357. *Poph.* 178. *Zouch dem. Abbot v. Parsons*, 3 Burr. 1805. *Keane v. Boycott*, 2 H.

Blac. 515. These cases were prior to the late rule of court, Hil. Term, 4 W. 4., 5 Barn. & Adol. viii., which declares that the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only; and that it can only be impeached by a special plea setting forth the cause of invalidity.

(*s*) Co. Lit. 273, a.; but see Lit. s. 547. Co. Lit. 45, b. 308, a.

(*t*) *Lane v. Cowper*, Mo. 105, 7th point. *Zouch dem. Abbot v. Parsons*, 3 Burr. 1808. *Perk.* s. 12.

(*u*) *Zouch dem. Abbot v. Parsons*, sup.

(*x*) 3 Burr. 1804. *Diamond v. Belamy*, Bend. 137, the first page of that number: the paging throughout the

One of the consequences of the lease being voidable is, that it may be confirmed after the infant has attained his age of twenty-one (*y*). The act of confirmation may be by deed (*z*), by parol (*a*), or inferred from conduct, acceptance of rent for instance (*b*). In a case before Lord Hardwicke (*c*), a party had devised some land and houses built thereon to his six children, the mother, acting as guardian to the children, who were all infants, demised the premises on a building lease for forty-one years; her eldest son, who was about nineteen years of age, joined with her in making the lease, and covenanted that the lessee should have quiet enjoyment, and that the rest of the children, when of age, should confirm the lease; the children all arrived at age, and accepted the rent for above ten years after the youngest came of age; and after such acceptance brought an ejectment against the lessee; who filed his bill to have the lease established. The lease being clearly a beneficial one for the infants, a decree was made to establish it during the residue of the term; and the Lord Chancellor ordered that the plaintiff should have his costs at law and in equity, considering that it was against conscience to bring an ejectment after these transactions.

So if a party takes a lease of an infant's lands, and the infant, on coming of age, mortgages the property to the lessee by deed referring to the lease, this will amount to a confirmation (*d*). And slighter circumstances such as the words of congratulation "God give you joy of your lease" (*e*), have been held equally efficacious.

The privilege of avoiding or confirming the lease is exercisable by the lessor, or his heirs in case of his death during

volume is very faulty. *Combes's case*, 9 Co. 76, b. *Pigot v. Garnish*, Cro. Eliz. 678, 734. *Thompson v. Leach*, Holt, 357. *Humphreston's case*, 2 Leon. 213.

(*y*) Lit. s. 547. *Baylis v. Dineley*, 3 Mau. & Selw. 477, 481.

(*z*) *Anon.* 2 Leon. 220-1.

(*a*) 4 Leon. 4, pl. 15.

(*b*) *Ashfield v. Ashfield*, W. Jo. 157;

S. C. Latch, 199; *Godb.* 364; *Noy*, 92; *Bendl.* 188. And see *Smith v. Low*, 1 Atk. 489. *Hamilton v. Cardross*, 3 Bro. P. C., Index, p. 359, tit. Confirmation, Toml. ed.

(*c*) *Smith v. Low*, 3 Atk. 489.

(*d*) *Story v. Johnson*, 2 Yo. & Col. Exch. 587, 607.

(*e*) 4 Leon. 4, pl. 15.

infancy, but not by strangers; and, if avoided, it is annulled *ab initio* (*f*).

An infant's lease cannot operate by way of estoppel, for estoppels must be mutual (*g*).

In some places, where the common law yields to the influence of particular custom, a person seised of lands holden in socage may at the age of fifteen grant an unavoidable lease (*h*). If an infant of that age can grant a lease of gavelkind lands descended to him, which is not clear, it must be for a freehold interest, the custom requiring a feoffment, and livery *propria manu* (*i*).

The Crown, being unaffected by the strict rules of the common law, cannot avail itself of a plea of infancy to avoid its lease (*k*); for, as Bacon observes (*l*), the politic rules of government have thought it necessary that he who is to govern and manage the whole kingdom should never be considered as a minor, incapable of governing himself and his own affairs.

In like manner, it has been held that a lease made by an infant parson, and confirmed by the patron and ordinary, was perfectly valid; for, having, though improperly, been instituted and inducted, he was rightful parson till deprived, and as competent to act in his corporate capacity as a person of full age (*m*).

Where the tutors and curators of an infant, in the name and on behalf of the infant, executed a tack of a salmon

(*f*) 3 Burr. 1305.

(*g*) *James v. Landon*, Cro. Eliz. 37. *Smith v. Low*, 1 Atk. 489. And see post, p. 52, *et seq.*, as to Estoppels.

(*h*) Co. Lit. 45, b. 21 E. 4. 24, pl. 10. *Combes's case*, 9 Co. 76, b.

(*i*) *Robins. Gav.* 280, cites Co. Copyh. s. 33. See p. 65. of *Hawkins's Ed.* 1764. This privilege is expressly excepted from the late Act of 8 & 9 Vict. c. 106, which enacts, s. 3, that a feoffment made after the 1st of Octr. 1845, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed.

(*k*) *Case of the Duchy of Lancaster*, Plowd. 212; S. C. 2 Dy. 209, b. pl. 22. *Jenk. Cent.* 224, case, 84. *Bro. Ab. tit. Age*, pl. 34. *Alcock v. Cooke*, 5 Bing. 340; S. C. 2 Mo. & Pa. 625.

(*l*) *Bacon on Leases*, 12.

(*m*) *Bro. Ab. tit. Age*, pl. 34. 64. 80. 3 *Bac. Ab.* 367. Now, however, in the Church of England a candidate must be twenty-three years of age before he can be ordained deacon, or have any share in the ministry; and full twenty-four before he can be ordained priest, and permitted to administer the communion.

fishery in Scotland to another, and thereby bound and obliged the infant to warrant peaceable possession to the lessee, and the lessee bound and obliged himself to pay the rent to the infant, it was held that the infant might maintain an action of debt in his own name for arrears of rent, although he was no party to the tack, nor was it proved that he had attained his majority (*n*).

*See Clark
L.R.Ch. App 292*

The probabilities of future litigation on this branch of our subject are greatly diminished by a late act of parliament (*o*), entitled "An Act for consolidating and amending the laws relating to property belonging to infants, femmes covert, idiots, lunatics, and persons of unsound mind," the 17th section of which provides, that, where any person being an infant under the age of 21 years is or shall be seised or possessed of or entitled to any land in fee or in tail, or to any leasehold land for an absolute interest, and it shall appear to the Court of Chancery to be for the benefit of such person that a lease or underlease should be made of such estates for terms of years, for encouraging the erection of buildings thereon, or for repairing buildings actually being thereon, or the working of mines, or otherwise improving the same, or for farming or other purposes, it shall be lawful for such infant, or his guardian in the name of such infant, by the direction of the Court of Chancery, to be signified by an order to be made in a summary way upon the petition of such infant or his guardian, to make such lease of the land of such persons respectively, or any part thereof, according to his or her interest therein respectively, and to the nature of the tenure of such estates respectively, for such term or terms of years, and subject to such rent and covenants, as the said Court of Chancery shall direct (*p*); but that in no such case shall any fine or premium be taken; and that in every such case the best rent that can be obtained, regard being had to the nature of the lease, shall be

(*n*) *Carnegie v. Waugh*, 2 Dow. & Ry. 277. *Fitzmaurice v. Waugh*, 3 Dow. & Ry. 273.

(*o*) 11 Geo. 4. & 1 W. 1. c. 65.

(*p*) The Court acted under this provision in *Harris v. Davis*, 1 Holt's Eq. Rep. 294.

reserved upon such lease ; and that the leases and covenants and provisions therein shall be settled and approved of by a Master of the said Court ; and that a counterpart of every such lease shall be executed by the lessee or lessees therein to be named ; and that such counterparts shall be deposited for safe custody in the Master's office until such infant shall attain twenty-one ; but with liberty to proper parties to have the use thereof, if required, in the meantime, for the purpose of enforcing any of the covenants therein contained ; provided that no lease be made of the capital mansion house and the park and grounds respectively held therewith for any period exceeding the minority of any such infant."

The 31st section provides, " that every surrender, and lease, assignment, conveyance, or other disposition, respectively granted and accepted, executed and made, by virtue of this act, shall be and be deemed as valid and effectual to all intents and purposes as if the person by whom, or in whose place, or on whose behalf, the same respectively shall be granted or accepted, executed and made, had been of full age, and had granted, accepted, made, and executed the same."

By the 36th section, the powers and authorities given by the act to the Court of Chancery in England are extended to all land within any of the dominions, plantations, and colonies, belonging to her Majesty, except Scotland.

The provisions of the act relative to the renewal of leases where the reversioner is an infant will be found in a future chapter.

Until this statute was passed, the Court could not grant leases to bind an infant after his infancy (*q*) ; and although in *Cecil v. Salisbury* (*r*), we find it said, that building leases for sixty years of infants' estates, where for their benefit, had often been decreed, yet it does not appear that that case has been followed in practice.

(*q*) *Sutton v. Jones* ; *Jones v. Sutton*, 15 Ves. 584, 586.

(*r*) *Cecil v. Salisbury*, 2 Vern. 224-5.

In a case decided before the enactment, where an estate was settled on A. for life, with remainder to B., an infant, the Vice Chancellor refused a motion, at the instance of the receiver in the cause, for a reference to the Master to inquire whether it would be beneficial to the parties in the suit that the receiver should make leases of the premises, the object of it being to enable the receiver to make leases which would bind the infant remainder-man, saying, that he recollected no instance in which the Court had assumed such a jurisdiction (*s*).

In the matter of Evans (*t*), a case affecting the construction of the 17th section of the Act, the petitioners were five infant sisters, upon whom had descended certain estates, of which their brother William, an infant of the age of seven years on the 14th of June, 1833, died seised in fee, leaving his father and mother living; and it was held that, as the infant petitioners had not then an indefeasible estate of inheritance, their estate being liable to be defeated by the birth of a son, or affected by the birth of a daughter or daughters of the father and mother, they were not seised of or entitled to the land in fee within the meaning of the Act, although they might ultimately acquire such an estate (*u*).

We may add, that, upon the administration of the real property of an infant, the Court will not delegate to the Master the power of approving leases of the estate: the order will be for him to receive proposals for leases, and to report his opinion upon the same to the Court (*x*).

Leases by guardians will be discussed hereafter (*y*).

(*s*) *Gibbins v. Howell*, 3 Madd. 469.

(*t*) *Mre Evans*, 2 Myl. & K. 318.

(*u*) But now, as by 3 & 4 W. 4. c. 106. s. 6, every lineal ancestor is rendered capable of being heir to any of his issue, in preference to collateral persons claiming through him, the land would, in the case cited, ascend to the father. The 11th section of the

act provides, that it shall not extend to any descent taking place on the death of any person before the 1st of January, 1834.

(*x*) *Symons v. Symons*, 2 Yo. & Col. Exch. 1.

(*y*) Post, Sect. IV. Who may be lessors with reference to office.

11.—*Persons of unsound mind, and their Committees.*

It was formerly held that every lease made by a person non compos mentis was voidable only (*a*) ; but a later decision (*b*), establishing a distinction between a lease for years, and one granted for a freehold interest, declares the former to be absolutely void ; and, in consequence of the relaxation of the ancient rule which prohibited a person from stultifying or blemishing himself (*c*), the grantor of a chattel lease might, when sane, till lately plead *non est factum*, and give the lunacy or idiocy in evidence (*d*). Now, however, he can only impeach it by a special plea setting forth the cause of invalidity, the plea of *non est factum* operating as a denial of the execution of the deed in point of fact only (*e*). A freehold lease made by feoffment by a person non compos mentis in person is voidable only, on account of the solemnity and notoriety of the transfer by livery of seisin (*f*) ; and may be set aside by his heir (*g*), or, after office found that the lessor was an idiot à nativitate, by the Crown (*h*). If livery be made in pursuance of a letter of attorney, the demise cannot be supported (*i*). A lease made during a lucid interval is not impeachable on the ground of previous or subsequent insanity (*k*).

The committee of a lunatic, being considered merely as a

(*a*) *Beverley's case*, 4 Co. 123, b. Co. Lit. 247, a.

(*b*) *Thompson v. Leach*, 3 Mod. 301 ; S. C. 12 Mod. 173 ; Com. 45 ; Comb. 438. 468 ; Holt, 357 ; Carth. 435 ; 1 Ld. Raym. 313 ; 2 Salk. 675 ; 3 Salk. 300 ; 1 Eq. Ca. Ab. 278, pl. 3 ; Show. P. C. 150.

(*c*) *Ibid.* *Beverley's case*, sup. *Stroud v. Marshall*, Cro. Eliz. 398, and 2 Bla. Com. 291, where the progress of this notion is traced.

(*d*) *Yates v. Boen*, 2 Stra. 1104 ; and see *Faulder v. Silk*, 3 Campb. 126.

Baxter v. Earl of Portsmouth, 5 Barn. & Cres. 170. *Browne v. Joddrell*, 1 Mood. & Malk. 105. *Levy v. Baker*, 1 Mood. & Malk. 106, n.

(*e*) Reg. Gen. Hil. Term, 4 W. 4. 5 Barn. & Adol. p. viii. And see *Gore v. Gibson*, 13 Mees. & Wel. 623—6.

(*f*) *Thompson v. Leach*, sup.

(*g*) *Beverley's case*, sup.

(*h*) *Ibid.*

(*i*) *Show. P. C.* 153. 3 Mod. 304.

(*k*) 1 Dow, P. C. 177-8. *Owen v. Davis*, 1 Ves. 32. *Pegge v. Skinner*, 1 Cox, 23.

bailiff, and having an estate but during pleasure, could never make leases of the lunatic's lands without special order of the Court of Chancery (*l*) ; nor could that Court, unaided by the Legislature, enable him to grant an absolute interest ; for the lunatic, on his recovery, might eject the lessee (*m*) ; and even such interest as it could confer was never recognised as a legal as distinguished from an equitable estate (*n*). The statutes 29 Geo. 2. c. 31, and 11 Geo. 3. c. 20 (*o*), being confined to leases on renewals, afforded but a partial remedy for the evil ; and it was not until the 43rd year of the reign of King George the 3rd (*p*), that the Lord Chancellor could direct the committee to make a demise for years independent, in point of duration, of the lunatic's restoration to sanity. The late act (*q*), by which these statutes have been repealed, has incorporated and consolidated their various provisions, and enacted (*r*), that where any person being lunatic is or shall be seised or possessed of any land either for life or for some other estate, with power of granting leases and taking fines, reserving small rents on such leases, for one, two, or three lives in possession or reversion, or for some number of years determinable upon lives, or for any term of years absolutely, such power of leasing, which is or shall be vested in such person being lunatic, and having a limited estate only, shall and may be executed by the committee of the estate of such person, under the direction and order of the Lord Chancellor, entrusted by virtue of the King's sign manual with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind.

This superintending authority was originally conferred on

(*l*) *Cocks v. Darson*, Hob. 215. Anon., semb. S. C., Hutt. 16. *Foster v. Marchant*, 1 Vern. 262 ; S. C. 1 Eq. Ca. Ab. 277. pl. 4 ; 326, pl. 13. *Knipe v. Palmer*, 2 Wils. 130.

(*m*) *Ex parte Dikes*, 3 Ves. 79.

(*n*) *Knipe v. Palmer*, 2 Wils. 130.

(*o*) Both since repealed by 11 Geo. 4.

& 1 W. 4. c. 65, in which their provisions are incorporated.

(*p*) 43 Geo. 3. c. 75, s. 4, repealed by 11 Geo. 4 & 1 W. 4, in which its provisions are incorporated.

(*q*) 11 Geo. 4 & 1 W. 4. c. 65.

(*r*) Sect. 23.

the Lord Chancellor in 1803 (*s*), previously to which time the committee could not execute the lunatic's power (*t*).

If the consent in writing of a person who afterwards becomes a lunatic be required to the valid execution of a power of leasing given to another, the court will not delegate the privilege of consenting to the committee (*u*).

By section 24 of the late Act (*x*), it is provided, that where any person being lunatic is or shall be seised or possessed of or entitled to any land in fee or in tail, or to any leasehold land for an absolute interest, and it shall appear to the Lord Chancellor entrusted as aforesaid to be for the benefit of such person that a lease or underlease should be made of such estates for terms of years for encouraging the erection of buildings therein, or for repairing buildings actually being thereon, or otherwise improving the same, or for farming or other purposes, it shall be lawful for the Lord Chancellor entrusted as aforesaid to order and direct the committee of the estate of such lunatic to make such lease of the land of such persons respectively, or any part thereof, according to his or her interest therein respectively, and to the nature of the tenure of such estates respectively, for such term or terms of years, and subject to such rents and covenants, as the Lord Chancellor entrusted as aforesaid shall direct.

By section 27, That when any person who shall have contracted to let any land shall afterwards become lunatic, and a specific performance of such contract, either wholly, or so far as the same shall remain to be performed, shall have been decreed by the Court of Chancery, either before or after such lunacy, it shall be lawful for the committee of the estate of such lunatic, in the place of such lunatic, by the direction of the Lord Chancellor entrusted as aforesaid, to be signified by an order to be made on the petition of the plaintiff or any of the plaintiffs in such suit, to convey such land, in pursuance

(*s*) By 43 Geo. 3. c. 75. s. 3.

(*u*) Ex parte Smyth ; Mrs Smyth, 2

(*t*) Ex parte The Committee of Lord
Bradford, Ca. temp. Hardw. by West,
133.

Swanst. 393.

(*x*) 11 Geo. 4 & 1 W. 4. c. 65.

of such decree, to such person and in such manner as the said Lord Chancellor entrusted as aforesaid shall direct; and that the purchase money or so much thereof as remains unpaid, shall be paid to the committee of such lunatic.

By section 31, That every surrender and lease granted and accepted, executed and made, by virtue of the act shall be deemed as valid and legal as if the person by whom, or in whose place, or on whose behalf, the same respectively shall be granted or accepted, executed and made, had been of full age, unmarried, or of sane mind, and had granted, accepted, made, and executed the same; and that every such surrender and lease respectively made and accepted by or on the behalf of a feme covert shall be valid without any fine (*y*) being levied by her.

By section 36, That the powers and authorities given by the act to the Court of Chancery in England shall extend to land within any of the dominions, plantations, and colonies, belonging to the Crown, except Scotland.

By section 38, That the powers and authorities given by the act to the Courts of Chancery and Exchequer in England shall and may be exercised in like manner and are thereby given to the Courts of Chancery and Exchequer in Ireland, with respect to land in Ireland.

By section 39, That the powers and authorities given by the act to the Lord Chancellor of Great Britain entrusted as aforesaid shall extend to all land within any of the dominions plantations and colonies belonging to the Crown, except Scotland and Ireland.

By section 42, That the powers and authorities given by the act to the Lord Chancellor of Great Britain entrusted as aforesaid shall and may be exercised in like manner by and are thereby given to the Lord Keeper or Commissioners of the Great Seal of Great Britain for the time being entrusted as aforesaid.

(*y*) Fines have been abolished by the Act of 3 & 4 W. 4. c. 74, and more simple modes of assurance substituted.

And by the second section, The provisions of the act relating to a lunatic are declared to extend to and include any idiot or person of unsound mind, or incapable of managing his affairs, unless there be something in the subject or context repugnant to such construction.

It was formerly the practice of the court to refer it to a Master to consider and report whether it would be for the benefit of the lunatic to make a lease; and, if it would, the committee received directions for that purpose (*z*), the committee paying the expenses of the inquiry, to be allowed on passing his accounts; and the lessee, the expenses of the lease (*a*). But by a recent Act of Parliament (*b*), after noticing the expediency of altering and amending the practice and course of proceeding under commissions in the nature of writs *de lunatico inquirendo*, the Lord Chancellor (*c*) was empowered (*d*), to appoint two persons to be "The Commissioners in Lunacy" (*e*), and it was declared and enacted (*f*) that it should be lawful for the Lord Chancellor to order and direct that any of the inquiries and matters connected with the persons and estates of lunatics usually referred to the Masters in ordinary of the High Court of Chancery, should be referred to such commissioners, or one of them. And the Lord Chancellor was empowered (*g*) from time to time to make such orders as to him should seem fit and proper for regulating the form and mode of proceeding before and by the said commissioners, and the practice in matters of lunacy. In pursuance whereof, Lord Lyndhurst, C., has ordered (*h*)

(*z*) *Knipe v. Palmer*, 2 Wils. 131.

(*a*) *Ex parte Prickett*; *Mre The Duchess of Norfolk*, 3 Swanst. 130.

(*b*) 5 & 6 Vict. c. 84.

(*c*) The words "Lord Chancellor" include the Lord Keeper or Lords Commissioners for the Custody of the Great Seal, or other the person or persons for the time being entrusted by virtue of the Queen's sign manual with the care and commitment of the custody of the persons and estates of

persons found idiot, lunatic, or of unsound mind; Sect. 17.

(*d*) Sect. 1.

(*e*) Now called "Masters in Lunacy," 8 & 9 Vict. c. 100, s. 2; and they are invested with all necessary powers of inquiry by sect. 96.

(*f*) Sect. 3.

(*g*) Sect. 7.

(*h*) See Orders of 27 Octr., 1842, No. 2. 3 Beav. lxix.

that all the inquiries and matters connected with the persons and estates of lunatics theretofore usually referred to the Masters in ordinary of the High Court of Chancery (except inquiries under or by virtue of the Act of 1 W. 4. c. 60 (*i*), and except where the Lord Chancellor shall from time to time otherwise specially direct), shall be hereafter referred to the Commissioners (now Masters) in lunacy for the time being. And (*j*) that the Commissioner (now Master) shall be at liberty, without special order, to receive any proposal or conduct any inquiry as to managing, setting, or letting the estate, or otherwise respecting the person or property of any lunatic, and may report thereon as he shall see fit; but that such report shall be submitted for confirmation as was then done with respect to such reports when made upon special reference.

It would appear, however, that the report will not always be adopted because no one objects to its confirmation. In a late case(*k*), decided before the passing of the act of 5 & 6 Vict. c. 84, the Master having reported that it was expedient to grant building leases for nine hundred and ninety-nine years of part of the lunatic's estate, the Lord Chancellor, on a petition to confirm the report, although no party opposed it, refused to make the order, and directed the Master to review his report.

Application was lately(*l*) made to the Lord Chancellor to sanction a lease by the committee of a lunatic tenant in tail for an absolute term of twenty-one years; and it was contended, that, as by the 24th section of 1 W. 4. c. 65, the Lord Chancellor might direct the committee to make such leases of the lands of the lunatic according to his interest therein, and the nature of the tenure of the estate, and for

(*i*) Entitled "An Act for amending the laws respecting conveyances and transfers of estates and funds vested in trustees and mortgagees; and for enabling Courts of equity to give effect to their decrees and orders in

certain cases."

(*j*) No. 13 of Orders, sup.

(*k*) *Mre Starkie*, 2 Russ. 197.

(*l*) In the *Matter of Starkie*; Ex parte Clayton, 3 Myl. & K. 247.

such term of years, as he the Lord Chancellor should approve; and as by the act for the abolition of fines and recoveries (*m*) the tenant in tail in possession might grant leases for any term, the Lord Chancellor might authorise the committee to make the lease required, because such lease would then be “according to the interest” of the lunatic in his estate; but his Lordship was clearly of opinion that the act 3 & 4 W. 4. c. 74, did not empower him to permit the committee to make any lease which the Lord Chancellor on behalf of the lunatic tenant in tail could not have authorised prior to the passing of that act; that to make such an order as was prayed would in fact be to enable the committee to bar the estate tail pro tanto, which his Lordship considered not to be within the intent of the act; and he added, that, in his opinion, the object could only be accomplished by means of a private act of parliament, if the parties thought it worth while to go to that expense.

The clauses of the act of 11 Geo. 4. & 1 W. 4. c. 65, relating to the renewal of leases by or to persons of unsound mind will be noticed in a future page; though here it may be permitted to add, that a renewed lease must be taken in the name of the lunatic, if the original lease was so made; but if the demise was originally made to a trustee for him, the renewal may be taken in the committee’s name (*n*).

The recent act (*o*) above referred to, for the regulation of the care and treatment of lunatics, has provided (*p*) that it shall be lawful for the Lord Chancellor from time to time to make orders for the appointment of a receiver, or otherwise, for the protection, care, and management, of the estate of the lunatic, and that such receiver shall have the same powers and authorities as a receiver of the estate of a lunatic found such by inquisition had when the act was passed.

(*m*) 3 & 4 W. 4. c. 74. s. 15.

(*o*) 3 & 9 Vict. c. 100.

(*n*) Ex parte Jermyn, 3 Swanst.

(*p*) Sect. 95.

III.—*Weak and aged Persons.*

The weakness of the lessor is not of itself a ground for annulling a lease granted by him (*a*). But, if obtained by fraudulent practices, the grant, even if valid at law, cannot be supported in equity (*b*). And, therefore, where A., a man poor and weak in his intellects, was prevailed on by B., his neighbour, to sign a paper, alleged to be an appointment of B. to be the receiver of the rent of a small estate belonging to A., and then let at 20*l.* per annum on a lease almost expired, but which afterwards turned out to be an agreement for a lease of the estate to B., at only 14*l.* per annum, and B. soon after obtained an actual lease from A. of the estate, for the term of 41 years, at the yearly rent of 14*l.*, in consideration of 5*s.*, for which a receipt was signed and witnessed, but no notice was taken of the agreement, it was held that the lease was void, being obtained by fraud and imposition (*c*).

Nor does old age, simply, incapacitate a person from granting a lease (*d*). The lady in the case quoted was nearly 75 years old. Fraud or imposition would, of course, defeat the lease in equity, if not at law; but the circumstance of age is not of itself a ground to presume imposition; for, as Mr. Justice Buller observed, we have seen the greatest abilities displayed at a greater age than 75.

(*a*) *Gartside v. Isherwood*, 1 Bro. C. C. 558, Appendix. And see *White v. Small*, 2 Ca. in Ch. 103. *Willis v. Jernegan*, 2 Atk. 251. *Osmond v. Fitzroy*, 3 P. Wms. 129; S. C. 2 Eq. Ca. Ab. 186, pl. 3. *Griffin v. Deveuille*, or *De Veulle*, Cox's note, 3 P. Wms. 130. 3 Woodd. Vin. Lect. Appendix, p. xvi. *Smyth v. Smyth*, 2 Madd. 75. 93.

Bridgeman v. Green, Wilm. 58.

(*b*) *Ibid.* *White v. Small*, 2 Ca. in Ch. 105. And see *Portington v. Alexander*, Com' Eglinton, 2 Vern. 189.

(*c*) *Webb v. St. Lawrence*, 5 Bro. P. C. 30; Toml. ed. vol. 3, p. 640; Jour. vol. 27, p. 581.

(*d*) *Lewis v. Pead*, 1 Ves. jun. 19.

IV.—*Persons intoxicated.*

At law, the stability or instability of a lease made by a man under the influence of intoxication would appear from some of the cases (*e*) to depend on the extent of his inebriety at the time; and it is laid down that such a degree as totally subdues the reasoning faculties deprives the party of the power of forming any legal engagement (*f*). Lord Ellenborough, however, ruled at nisi prius, that intoxication, without reference to the degree, was good evidence upon a plea of *non est factum* (*g*). Whether the distinction obtains in this country, as in Scotland (*h*), is not fully established by authority.

Whatever may be the rule of law, the practice of equity on the subject is clearly ascertained. That court, considering its interference likely to operate as an encouragement to drunkenness, wisely abstains, in the absence of fraud, from enforcing or annulling the contract (*i*). Even particular acts of excessive drinking are insufficient to defeat the transaction in a court of equity; for the party injured may resort to his legal remedy (*j*).

But if by artifice the lessor be allured to drink, and advantage be taken of his condition, the Court will interfere for his protection, and rescind the contract (*k*). Thus, in the case of

(*e*) *Cooke v. Clayworth*, 18 Ves. 16. *Smith v. Downing*, Rep. temp. Hardw. by West, 93. *Nagle v. Baylor*, 3 Dru. & War. 60-4. *Gore v. Gibson*, 11 Mees. & Wel. 623.

(*f*) *Ibid.*

(*g*) *Pitt v. Smith*, 3 Campb. 33. *Fenton v. Holloway*, 1 Stark. 126. And see *Cole v. Robins*, Bull. N. P. 172. See now, as to the plea of *non est factum*, Reg. Gen. Hil. Term, 4 W. 4., 5 Barn. & Adol. viii., ante, p. 31. n. (*r*).

(*h*) "Persons while in a state of absolute drunkenness cannot oblige themselves; but a lesser degree of drunkenness which only darkens reason, has not the effect of annulling the

contract." *Stair*, July 29th, 1672. Lord Hatton, Ersk. Inst. 447. s. 16; Ivory's edit. vol. 2, p. 593, s. 16.

(*i*) *Johnson v. Medlicott*, 3 P. Wms. 131, n. [A]. *Cory v. Cory*, 1 Ves. 19. *Cooke v. Clayworth*, 18 Ves. 14. *Cragg v. Holme*, Rolls, May, 1811, cited 18 Ves. 14. *Nagle v. Baylor*, 3 Dru. & War. 60-4. And see *Malins v. Freeman*, 2 Keen, 25. 34.

(*j*) *Smith v. Downing*, Rep. temp. Hardw. by West, 90.

(*k*) See cases in note (*i*), and *Rich v. Sydenham*, 1 Ca. in Ch. 202. *Butler v. Mulvihill*, 1 Bli. P. C. 137. *Dunnage v. White*, 1 Swaust. 137.

Say *v.* Barwick (*l*), a lease contracted to be granted by an infant at an undervalue, and executed at an early hour of the morning on which he attained his majority, was set aside with costs, the plaintiff having, through the defendant's contrivance or encouragement, been in a state of continual or habitual intoxication for a long period, including the night prior to the execution of the lease. The lessor, indeed, about five weeks afterwards, pointed out to the attorney who drew the lease a trifling mistake, and said that, if necessary, he was ready to execute it again; but this circumstance was not considered equivalent to a confirmation, as the plaintiff at the time was not apprised of the true value of the estate, and still continued to live at the defendant's house in the same habits of inebriety as at the time of making the lease.

v.—*Persons deaf, dumb, and blind.*

Neither deafness, dumbness, nor blindness, though it be necessary to resort to signs for expressing intention, occasions any incapacity to lease, provided the party be in possession of his intellectual faculties, and capable of comprehending the nature and consequences of the deed tendered for his execution (*m*); and it would seem, that even persons deaf and dumb at the same time enjoy the like free agency, provided they have understanding (*n*).

Yet if, by fraud and misrepresentation, a lease different from the one directed to be prepared, be imposed on a blind man for execution, he may afterwards treat it as a nullity (*o*).

Persons deaf, dumb, and blind, from their nativity labour under an absolute incapacity (*p*).

(*l*) Say *v.* Barwick, 1 Ves. & B. 195.

(*m*) Co. Lit. 42, b. Shulter's case, 12 Co. 90, a.

(*n*) Eliot's case, Cart. 53. Perk. s. 25.

(*o*) Shulter's case, sup. And see Manser's case, 2 Co. 3, a.; S. C. Mo. 182. Throughgood's case, 2 Co. 9, a.;

S. C., nom. Throwgood *v.* Turnor, Mo. 143; S. C., nom. Thoroughgood *v.* Cole, 1 And. 129. See also Anon. Skin. 159.

(*p*) Co. Lit. 42, b. Perk. s. 25. Tong *v.* Saut, 1 Dy. 56, a., and note (13), Vaillant's ed., 1794. Com. Dig. Capacity, (D. 4.)

VI.—*Persons under duress.*

A lease made by a party under duress is not void, but voidable only by him when he recovers his free agency (*q*) ; but he cannot plead *non est factum*, for it is his deed at the time of the action brought, and ought to be avoided by special pleading (*r*).

VII.—*Outlaws.*

A lease made by an outlaw before an inquisition taken, will prevent the Queen's title, if it be made bonâ fide, and upon good consideration ; but not if it be in trust for the outlaw himself. But no conveyance made after the inquisition will take away or discharge the title of the Crown(s). Against all others the outlaw's lease is good (*t*).

It is observable, however, that if a lessor be outlawed in a civil action, and the lands demised be found by inquisition, which is estreated into the Exchequer, and the lands thereupon granted *in custodiam*, he cannot maintain an ejectment against the tenant for the nonpayment of rent of those lands (*u*).

VIII.—*Feme sole.*

A feme sole is competent to lease her lands, provided she be not at the time labouring under any particular disability, such as unsoundness of mind, or the like. And if she make a lease at will, and afterwards marry, the tenancy will not be

(*q*) Throughgood's case, 2 Co. 9, b.
5 Co. 119, a. 2 Inst. 483. Shep.
Touch, 233, Prest. ed. Perk. s. 16.
(*r*) 5 Co. 119, a. And see as to the
plea of *non est factum*, Reg. Gen. Hil.
Term, 4 W. 4., 5 Barn. & Adol. viii.

Ante, p. 31, n. (*r*).

(*s*) Attorney-General *v.* Freeman,
Hardr. 101.

(*t*) Shep. Touch. by Prest. 232.

(*u*) King dem. *Poe v. Ball*, Ridgew.
Lapp. & Scho. 94.

determined without some express act by the husband to defeat it (*x*).

The lessee of a feme sole must, after her marriage, pay his rent to her husband; nor will ignorance of the marriage protect him at law, whatever it may do in equity, from payment to the husband, although the rent had been previously demanded by, and paid to, the wife (*y*).

IX.—*Feme covert*.

A feme covert having, generally speaking (*z*), no legal existence distinct from that of her husband, is incapable, without his concurrence, of making a valid lease at law of lands of which he and she are seised in her right, or of which he is possessed in her right (*a*). Her deed being absolutely void does not admit of confirmation (*b*). Formerly, when discovert, she might have pleaded *non est factum*, and given the former coverture in evidence (*c*); but now a special plea is necessary (*d*). A feme covert is not bound by estoppel (*e*).

So, in equity, if a feme covert contracts for the grant of a lease of her separate estate, a bill for a specific performance will not lie against her, as she is incompetent to enter into a contract so as to give a remedy against her *in personam* (*f*). The Court in such cases acts *in rem*; but, although a feme

(*x*) Crooke's case, Hetl. 72; S. C. Keilw. 162. Henstead's case, 5 Co. 10, a. Cro. Car. 304. Co. Lit. 55, b.

(*y*) Tracy v. Dutton, Cro. Jac. 617, the second page of that number. Palm. 206.

(*z*) The Queen Consort is an exception, 4 Cru. Dig. 20. See post, as to leases by the Crown; and as to a Feme covert's lease under a power; and as to leases by Baron and feme.

(*a*) 3 & 4 W. 4, c. 74, s. 77.

(*b*) 3 H. 6, 53, 22. Manby v. Scott, 1 Sid. 120; S. C. 1 Mod. 124-5; 1 Keb. 69, 80, 87, 206, 337, 361, 383, 429,

441, 482. Jennings v. Bragg, Cro. Eliz. 446; cited, 3 Co. 35, b. St. John v. St. John, 11 Ves. 529, 531. Zouch dem. Abbot v. Parsons, 3 Burr. 1805.

(*c*) Zouch dem. Abbot v. Parsons, 3 Burr. 1805.

(*d*) Reg. Gen. Hil. Term, 4 W. 4., 5 Barn. & Adol. viii. ante, p. 31, n. (*r*).

(*e*) Sacheverel v. Frogate, 1 Vent. 161. James v. Landon, Cro. Eliz. 37. Brereton v. Evans, Cro. Eliz. 700.

(*f*) Francis v. Wiggzell, 1 Madd. 258. Aylett v. Ashton, 1 Myl. & Cr. 105.

covert has power, and the Court has jurisdiction, over the rents and profits, no case has given effect to her contracts against the *corpus* of her separate estate (*g*).

The means by which the lands of a married woman may be demised, being discussed at length in the chapter on leases by husband and wife (*h*); and the mode of obtaining renewals of leases granted by her previously to marriage, being noticed in the chapter on renewals (*i*); it will be unnecessary to do more in this place than refer the reader to those parts of the work.

SECTION II.—WITH REFERENCE TO ESTATE; AND HEREIN OF LEASES BY ESTOPPEL.

1.—*Owner of interesse termini—Disseisee—Heir before entry—Bargainee before enrolment—Dowress before assignment of dower—Disseisor—Abator—Intruder—Cestui que use before entry—Remainder-man and Reversioner.*

It has lately been enacted (*k*) that, after the 1st day of October, 1845, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments, of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed. But it is yet to be decided whether the term *dispose of* applies to the leasing powers of the persons whose interests are enumerated in the Act.

(*g*) Per M. R. in *Aylett v. Ashton*,
1 Myl. & Cr. 105. 112. But see *Stead*
v. Nelson, 2 Beav. 245.

(*h*) Post.

(*i*) Post.

(*k*) 3 & 9 Vict. c. 106, s. 6.

Previously to its passing, in order to create a lease, to operate *in presenti* (*l*), it was essential that the lessor should be in possession of the premises, or have an *interesse termini* (*m*), at the time of the demise. A party having a naked right of entry only could not grant a present lease (*n*). Thus, a disseisee, until he revested his seisin by entry, and continued in the seisin (*o*), could not support the character of lessor, so as to pass a present interest (*p*). So, a demise by an heir in the interval between an abatement by a stranger and his own re-entry could not be sustained (*q*).

But the rule did not extend to the state of an heir at law before entry, his possession in law, no other having a possession in deed, clothing him with sufficient power to grant a lease (*r*).

It must not be forgotten that leases granted on or before the 1st of October, 1845, are not affected by the act referred to.

A bargainee of a freehold estate before enrolment still labours under the disability noticed; nor will subsequent enrolment within the period limited by the statute (*s*) impart, by the doctrine of relation, validity to the lease (*t*).

The law is the same with regard to a dowress, who is incapable of demising her portion of the land recovered in a

(*l*) See, as to leases operating by estoppel, post, p. 52.

(*m*) Doe dem. Parsley v. Day, 2 Q. B. 147. 156. Co. Lit. 46, b. Shep. Touch. 269.

(*n*) Berrington v. Parkhurst, 2 Stra. 1686; S. C. Andr. 125; 4 Bro. P. C. 353; Toml. ed. vol. 4, p. 35; Jour. vol. 25, p. 257. Doe dem. Duckett v. Watts, 9 East, 20, n.

(*o*) See Doe dem. Duckett v. Watts, 9 East, 20, n.

(*p*) Jennings v. Bragg, Cro. Eliz. 447; S. C. cited, 3 Co. 35, b. And see Stephens v. Eliot, Cro. Eliz. 484. Countess of Sussex v. Wroth, 3 Leon. 141. Shep. Touch. 269.

(*q*) Plowd. 137, a. 142.

(*r*) Com. Dig. Seisin, (A. 2.) Shep. Touch. 269.

(*s*) Six lunar months, 27 Hen. 8. c. 16. 2 Inst. 674. Shep. Touch. 223.

(*t*) Bellingham v. Alsop, Cro. Jac. 52; S. C. Noy, 106. Dymmock's case, Cro. Jac. 408; S. C., nom. Dimmock's case, Hob. 136. Ischam v. Morrice, Cro. Car. 109. 110, 4th resolution; S. C., nom. Norris v. Isham, Hetl. 81. Bennett v. Gawdy, Carth. 178. Perry v. Bowes, Bowers, or Bowyer, 1 Vent. 360; S. C. T. Jo. 196; Skin. 30; S. C., nom. Berris v. Bowyer, 2 Show. 156. Elliott v. Danby, 12 Mod. 3. It is submitted that Mr. Preston's position to the contrary, 3 Prest. Abst. 90-1, cannot be supported.

writ of dower (*u*) until seisin be delivered to her by execution (*x*).

But a possession, however short, and whether it be a possession in fact, or in law (*y*) or rightful, or tortious, as in the case of a disseisor (*z*), or, as it seems, an abator, or an intruder upon the possession of the lessee of the Queen, who is not herself disseisable (*a*), will warrant a lease for years, which will avail against all persons, except the party having the right of possession (*b*), by whose re-entry the lessee's estate may be defeated (*c*), and the lessee absolved from the performance of covenants dependent upon the enjoyment of the premises (*d*); though a lease by a disseisor, being voidable only, and not void, is capable of confirmation (*e*); and the disseisee may apportion his confirmation, where the disseisor's tenant for years has underlet, by ratifying the one lease, and not the other, or by confirming the whole or part of the land, for all or any number of the years (*f*).

The possession conferred by the statute of uses (*g*) is sufficient to enable the *cestui que use* to grant a lease without a previous entry into the lands demised (*h*).

And it is clear that a person having a present right to the future enjoyment of an estate, as a remainder-man or reversioner, expectant either upon an estate for years, for life, or in tail, may make a lease, which will take effect in possession on the determination of the preceding estate (*i*).

(*u*) The writ of right of dower was excepted from the sweeping operation of the 36th section of the limitation act of 3 & 4 W. 4. c. 27.

(*x*) Shcp. Touch. 269.

(*y*) Plowd. 137, a. 142.

(*z*) Lee v. Norris, Cro. Eliz. 331. Thurston's case, Ow. 16.

(*a*) Thurston's case, sup. Lee v. Norris, sup.

(*b*) Ibid. Vin. Ab. tit. Estate, (R. a. 5) pl. 3.

(*c*) Mo. 50. pl. 150. 2 Vent. 68.

(*d*) Andrews v. Needham, Cro. Eliz. 656; S. C. Noy, 75. But see Cooch

v. Goodman, 2 Q. B. 580; S. C. 2 Ga. & Dav. 159.

(*e*) Belford v. Foord, or Betford v. Ford, Cro. Eliz. 447, and 472, being the second page of that number; S. C., nom. Foord's case, 5 Co. 81, a. b.; 3 Dy. 383, b.; 1 And. 47.

(*f*) Ibid.

(*g*) 27 Hen. 8. c. 10.

(*h*) But he cannot maintain trespass till entry; Lutwich v. Mitton, Cro. Jac. 604. Cart. 66. Other cases ante, p. 23, n. (*r*).

(*i*) Jenk. Cent. 267, case, 77. Palmer v. Thorpe, Cro. Eliz. 152.

II. — *As to Leases by Estoppel.*

It has been stated (*k*), that, in order to create an effectual lease to operate *in presenti*, it was essential, with reference at least to demises made on or before the 1st of October, 1845, that the lessor should be in possession of the premises at the time of the demise. It is not, however, to be understood that the lease of a party out of possession was totally inoperative; for a demise of this description derived a new feature from the doctrine of estoppel, of which I shall here attempt a succinct explanation, with an assurance to the reader of its being, in Lord Coke's phrase, an excellent and curious kind of learning (*l*), well deserving his attentive consideration.

An estoppel is, properly speaking, an impediment or bar raised by law upon a man's own deed to his averring or proving anything in contradiction to what he has once so solemnly and deliberately avowed (*m*). It is sometimes also termed *a conclusion*, from its determining, finishing, closing, or shutting up the mouth, so that the party cannot speak, plead, or claim, anything contrary to his deed (*n*).

Estoppels, having a tendency to prevent the investigation of the truth (*o*), are considered odious in law (*p*); and the reasons why they are allowed seem to be, that no man ought to allege anything but the truth for his defence, and what he has alleged once is to be presumed true, and, therefore, he ought not to contradict it; for *allegans contraria non est audiendus*; and, secondly, that as the law cannot be known till the facts are ascertained, so neither can the truth of them be found out but by evidence; and, therefore, it is reasonable that some evidence should be allowed to be of so high

(*k*) Ante, p. 50.

(*l*) Co. Lit. 352, a.

(*m*) 2 Bla. Com. 295. Co. Lit. 352, a.
Com. Dig. Estoppel, (A).

(*n*) Co. Lit. 37, a. 170, a.

(*o*) Rex v. Lubbenham, 4 Term Rep. 254.

(*p*) Co. Lit. 365, b. 2 Ld. Raym. 1553. Skipwith v. Green, 8 Mod. 311. 313. Bac. Ab. Joint-tenants, (H) 1.

and conclusive a nature as to admit of no contradictory proof (*g*).

Hence, a lease by indenture (*r*) by a person having no estate whatever (*s*), as an heir apparent; by a party claiming under an executory devise (*l*), or contingent remainder (*u*); or by a person having a wrongful estate only in the premises (*x*); would operate by way of estoppel and conclusion against him on his obtaining a vested or rightful interest, whether by purchase (*y*) or descent (*z*). A mortgagor is similarly circumstanced, and will be precluded by estoppel from claiming the land after redemption in opposition to his own lease (*a*). So, if one having no interest in the premises, by indenture make a lease for years to B., reserving a rent, and afterwards by indenture demise the same land to C. for forty years, C. shall have the rent by the same means by which he has the reversion, i.e., by estoppel (*b*).

If a party lease lands in which he has no estate, and afterwards acquire an estate, the lease which before operated by estoppel only, becomes a lease in interest (*c*).

It is, however, in all cases requisite that the premises forming the subject of demise be particularly specified or referred to; for a demise by A. of all his lands in Dale, not being at the time owner of any lands there, to B. for years, will fail, on account of its generality, to create an estoppel

(*g*) Co. Lit. 352, a. note (1).

(*r*) See post, p. 55, as to the necessity for an indenture.

(*s*) Mo. 20. pl. 69. 1 Rol. Ab. 374. pl. 9. Rothwell's case, Hetl. 91. Anon. Dal. 26. pl. 4. Foote v. Berkley, Plowd. 527. 545. Rawlyns's case, 4 Co. 53, a., 4th resolution. Iselham v. Morrice, Cro. Car. 109; S. C., nom. Norris v. Isham, Hetl. 81. Hermitage v. Tomkins, 1 Ld. Raym. 729. Smith v. Low, 1 Atk. 489. Co. Lit. 47, b. 3 Term Rep. 371.

(*l*) Cooks; or Hooks, v. Bellamy, 1 Keb. 530. 623. 703; S. C. 1 Sid. 187.

(*u*) Weale v. Lower, Pollexf. 54.

3 Com. Dig. 274, Estoppel, (B).

(*x*) Paulin v. Hardy, Skin. 2. 62.

(*y*) See the cases cited in note (*s*), sup.

(*z*) Smith v. Low, 1 Atk. 489. Plowd. 434.

(*a*) Edwards v. Omellhallum, March, 64. Omelaughland v. Hood, 1 Rol. Ab. 374. pl. 10. 376. pl. 5. Webb v. Austin, 3 Scott's N. R. 419; S. C. 7 Man. & Gra. 701; Law Jour. N. S. vol. 13. p. 203, C. P. And see Doe dem. Marriott v. Edwards, 6 Car. & Pa. 203.

(*b*) Jenk. Cent. 254, case, 46. Plowd. 433. Webb v. Austin, sup.

(*c*) Webb v. Austin, sup.

against him, on his subsequent acquisition of an estate in Dale(*d*).

But should it appear upon the face of the indenture that the lease is made by one who has not an interest (and who really has not) to make a lease, and he afterwards purchases the land, the rule of estoppel will not prevail(*e*). And, for the same reason, where a church in the incumbent's lifetime was appropriated *in futuro* to a body corporate, and the said body, reciting this, made a lease in the life of the incumbent, the lease was held to be void; it appearing by the deed that the corporation had nothing(*f*). But where a party seised of an estate in Dale, falsely reciting that he had nothing in that manor, made a lease to B. by indenture for years, the recital was held to be void, and the lease good by estoppel; for the law rejects a false recital which makes a contradiction(*g*).

Whether a deed incapable of operating in the way intended may conclude the party by falling within the doctrine under consideration is not decided. The point arose in the case of *Roe v. The Archbishop of York* (*h*), where a demise was made by tenant for life, and expressed to be in pursuance of a power of leasing; but, as the Court held the lease to be void for informality as an execution of the power, they did not deem it necessary to enter into the question of estoppel. There seems to be reason for contending that if the lease could have derived its validity from the lessor's ownership, the doctrine of estoppel could not apply, as it is a rule that a lease shall not work by way of estoppel when it may pass an interest(*i*).

(*d*) Jenk. Cent. 255, case, 46.

(*e*) *Hermitage v. Tomkins*, 1 Ld. Rayn. 729. Jenk. Cent. 255, case, 46. *Cooks v. Bellamy*, 1 Keb. 531. Co. Lit. 352, b. And see *Right dem. Jefferys v. Bucknell*, 2 Barn. & Adol. 278; and *Doe dem. Lumley v. Earl of Scarborough*, 3 Adol. & Ell. 2; S.C. 4 Nev. & Man. 724.

(*f*) Jenk. Cent. 255, case, 46. *Montgomery's case*, 2 Dy. 244, a.; 1 Co. 155. a. 2 Barn. & Adol. 281.

(*g*) Jenk. Cent. 255, case, 46.

(*h*) *Roe dem. Earl of Berkeley v. The Archbishop of York*, 6 East, 46; S. C. 2 Smith, 166.

(*i*) 2 Prest. Conv. 139.

One of the rules connected with this learning requires every estoppel to be reciprocal, and binding on both parties (*k*); hence, a stranger can neither take advantage of, nor be bound by, an estoppel (*l*). Infants also (*m*), and married women (*n*), on account of their legal disability, and persons contracting with them, are exempt, for want of mutuality from the operation of the doctrine; and, accordingly, if one takes a lease by indenture of his own land from an infant or feme covert, he is not bound by estoppel from disputing the demise (*o*). So, if husband and wife declare against a party in debt for rent on a lease made by the feme and her former husband, the defendant may plead the sole seisin of the former husband, without being estopped by the lease (*p*). So, on the other hand, if a man and his wife make a lease, reserving a rent to himself and his wife, and his heirs, he may bring debt for the rent, and declare as on a lease made by himself alone, and the reservation to himself. In each case the lease being void as to the wife, want of mutuality prevents an estoppel (*q*). And as the Crown is not bound by estoppel, a man taking a lease of his own land by patent from the King is not estopped from showing it (*r*).

The rule which requires reciprocity in cases of estoppel obviously involves the necessity for a lease by indenture; for, according to Littleton (*s*), Coke (*t*), and other authorities (*u*), if a lease be made by deed-poll, the lessee is not estopped to say that the lessor had nothing at the time of the lease made; and the reason why a deed indented will,

(*k*) Co. Lit. 352, a.

(*l*) Ibid. Right dem. Jefferys v. Bucknell, 2 Barn. & Adol. 278.

(*m*) James v. Landon, Cro. Eliz. 37. Smith v. Low, 1 Atk. 439.

(*n*) Sacheverel v. Frogate, 1 Vent. 161. James v. Landon, Cro. Eliz. 37. Brereton v. Evans, Cro. Eliz. 700.

(*o*) James v. Landon, sup.

(*p*) Brereton v. Evans, Cro. Eliz. 700.

(*q*) Sacheverel v. Frogate, 1 Vent.

161. But Boverton v. Evans, 1 Rol. Ab. 872, pl. 6, semb. cont.

(*r*) Stanhop's case, 1 Rol. Ab. 871. pl. 3.

(*s*) Lit. s. 58.

(*t*) Co. Lit. 47, a. b. 363, b.

(*u*) Hilman v. Hore, Carth. 247-8. Cooks, or Hooks, v. Bellamy, 1 Keb. 530. 628. 708. Plowd. 421. 433-4. Pike v. Eyre, 9 Barn. & Cres. 909. 914; S. C. 4 Man. & Ry. 661.

but a deed-poll will not, conclude the taker, is, because the latter is the deed of the feoffor, donor, and lessor only; while the former is the deed of both parties, and concludes, therefore, the taker, as well as the giver (*x*).

Ch. D. 560.

Upon the same principle, it should seem, that, to enure by way of estoppel, the indenture must be executed by both lessor and lessee (*y*), an indenture executed by the one and not the other being equivalent to a deed-poll (*z*); though, for this purpose, a lease executed by the lessor only, and a counterpart by the lessee, are considered as one indenture (*a*).

But it has been determined that if a bond be given for the performance of the covenants contained in a certain indenture, the obligor is estopped from denying the existence of the indenture (*b*). And in a late case (*c*), where a lessee gave a bond for the payment of the yearly rent of 170*l*., recited in the condition to be reserved in the lease, the lessee was held to be estopped from showing that the rent reserved by the lease was in fact 140*l*., and not 170*l*.

If an interest (which, it appears (*d*), signifies a legal interest) passes, the lease cannot operate by way of estoppel (*e*); for

(*x*) Co. Lit. 363, b. One of the many objections to the late Act of 7 & 8 Vict. c. 76, to simplify the transfer of property, was occasioned by the 11th section providing, that "it should not be necessary in any case to have a deed indented, and that any person not being a party to any deed might take an immediate benefit under it, in the same manner as he might under a *deed-poll*," which would prevent the instrument operating by way of estoppel. But the Act has since been repealed by 8 & 9 Vict. c. 106.

(*y*) *Palmer v. Ekins*, 2 Ld. Raym. 1550-1; S. C. 2 Stra. 317; 1 Barnard. B. R. 103. *Wood v. Day*, 1 J. B. Mo. 339, 400; S. C. 7 Taunt. 646. *Hill v. Saunders*, in error, 9 Barn. & Cres. 534; S. C. in C. P., 2 Bing. 112; 9 Mo. 233; 1 Car. & Pa. 30. *Wilson*

v. Woolfryes, 6 Mau. & Selw. 341. *Cardwell v. Lucas*, 2 Mees. & Wel. 111. 117.

(*z*) *Atkinson v. Coatsworth*, 1 Stra. 512; S. C. 8 Mod. 33.

(*a*) *Wilson v. Woolfryes*, sup.

(*b*) 1 Rol. Ab. 872, pl. 3. *Lainson v. Tremcere*, 1 Adol. & Ell. 792; S. C. 3 Nev. & Man. 603.

(*c*) *Lainson v. Tremcere*, sup.

(*d*) *Blake v. Foster*, 8 Term Rep. 496.

(*e*) Co. Lit. 45, a. *Treport's case*, 6 Co. 14, b. *Hill v. Saunders*, in error, 4 Barn. & Cres. 529; S. C. in C. P., 2 Bing. 112; 9 Mo. 233; 1 Car. & Pa. 30. *Fawcett v. Hall, Ale. & Nap.* 248. 254. *Doe dem. Strode v. Seton*, 1 Gale, 303. But see *Gilman v. Hoare*, 1 Salk. 275, where Holt, C. J., said, that a lease for years might operate

one deed cannot so enure to two intents (*f*). Therefore, if a tenant *pur autre vie* leases for twenty-one years, and, after having purchased the fee, the *cestui que vie* dies, the lessor may avoid his lease; because an interest passed for the life of the *cestui que vie* (*g*). So, if A., tenant for life, and B., remainder-man in fee, join in a lease, the lessee cannot, in the lifetime of A., recover in ejectment declaring upon the demise of both; for the lease during A.'s life is his demise, and must be so pleaded; nor can the deed work an estoppel, on account of the interest that passed to the lessee (*h*). So, if two join in a lease, and one only has any interest in the premises, it enures by way of confirmation from the other, and not by way of estoppel (*i*).

An estoppel is not confined to the parties to the lease, but, being annexed to the estate, runs with the land, and is binding alike on all persons claiming under them (*k*).

The heir of the reversioner, being privy in blood, and taking the estate subject to the burthens under which his ancestor enjoyed it, is bound by the estoppel where that ancestor, having no estate in the premises (*l*), or only a contingent remainder (*m*), made a lease by indenture, and afterwards purchased the fee of the land demised, and died. It is also said (*n*), though the position cannot safely be relied

and take effect as to part by estoppel, and as to the residue by passing a real interest, was very plain from the common case of concurrent leases, which were all of them good as to part by estoppel, and a rent reserved thereon; S. C., nom. *Hilman v. Hore*, Carth. 247; S. C., nom. *Holman v. Hoare*, 3 Salk. 152. And see *Alc. & Nap.* 254, n.

(*f*) *Brereton v. Evans*, Cro. Eliz. 700-1. O. Bridgm. v. Ban. 544.

(*g*) Co. Lit. 47, b. Anon. Mo. 20. pl. 69. Treport's case, sup. Jenk. Cent. 255. *Palmer v. Ekins*, 2 Ld. Raym. 1550; S. C. 2 Stra. 817; 1 Barnard. B. R. 103; 11 Mod. 407.

(*h*) Co. Lit. 45, a. 6 East, 102-3.

(*i*) *Brereton v. Evans*, sup. Brooks v. Foxcroft, Clayt. 137.

(*k*) *Trevivian v. Lawrence*, Holt, 282; S. C. 6 Mod. 256; 1 Salk. 276; cited, 2 Ld. Raym. 1551. *Rawlins's* case, 4 Co. 53, a. Co. Lit. 352, a. *Weale v. Lower*, Pollexf. 61. Goodtitle dem. *Faulkner v. Morse*, 3 Term Rep. 371. *Webb v. Austin*, 8 Scott's N. R. 419; S. C. 7 Man. & Gra. 701; Law Jour. N. S. vol. 13, p. 203, C. P.

(*l*) *Rothwell's* case, Hetl. 91. Anon. Mo. 20. pl. 69; S. C. Dal. 26. pl. 4.

(*m*) *Weale v. Lower*, Pollexf. 54. But see 8 & 9 Viet. c. 106. s. 6, ante, p. 49.

(*n*) Jenk. Cent. 255, case, 46.

on (*o*), that if a lessee for twenty years make a lease by indenture for one thousand, this is an estoppel; and if the mesne lessor afterwards purchase the fee of the land, it will bind him and his heirs. The heir, however, will not be bound, unless he claim the land from him who created the estoppel; and, therefore, if the heir purchase the reversion himself, or if it devolve upon him by descent from another ancestor, he will not be bound (*p*). Nor will he be bound, unless the estoppel would have operated upon the inheritance in the hands of his ancestor; and, consequently, if tenant for life lease for years, and afterwards purchase the reversion in fee, and die within the term, his heir may enter; for, a freehold being a greater estate than any term of years, the decease of the tenant for life, out of whose estate the lessee's interest arose, is the regular period appointed by law for the determination of the lease (*q*).

Privies in estate are also bound. Thus if A. make a lease by indenture of D., to which he has no title, and afterwards, becoming its owner in fee, dispose of it to B., the latter will be estopped from disputing the lease (*r*). So, if a mortgagor grant a lease, and after performance of the condition in the mortgage make a feoffment in fee, the feoffee will hold subject to the estoppel (*s*). So, the lessor's assignees may take advantage of estoppels (*t*), even though he become bankrupt (*u*).

(*o*) See 1 Vent. 358; and Abbott's Argument in *Blake v. Foster*, 8 Term Rep. 490; and 3 Bac. Ab. 442, which has a *quære* on the point.

(*p*) W. Jo. 460. 3 Com. Dig. 275, Estoppel, (C). Goodtitle dem. *Faulkner v. Morse*, 3 Term Rep. 371.

(*q*) Anon. Mo. 20. pl. 69; S. C. Dal. 26. pl. 4. Jenk. Cent. 255, case, 46. Rothwell's case, Hetl. 91. Co. Lit. 47, b. Treport's case, 6 Co. 15, a. Gilman v. Hoare, 1 Salk. 275. And see *Ludford v. Barber*, 1 Term Rep. 86. Roe dem. *Brudnell v. Roberts*, 2 Wils. 143. *Blake v. Foster*, 3 Term Rep. 487. *Carvick v. Blagrove*, 1 Brod. & Bing. 531; S. C. 4 Mo. 303.

(*r*) *Trevivian v. Lawrence*, Holt, 282; S. C., 1 Salk. 276; 6 Mod. 256. *Isham v. Morrice*, Cro. Car. 109; S. C., nom. *Norris v. Isham*, Hetl. 81. *Weale v. Lower*, Pollexf. 54. *Reresbie's case*, Clayt. 41. *Webb v. Austin*, 3 Scott's N. R. 419; S. C. 7 Man. & Gra. 701; Law Jour. N. S. vol. 13, p. 203, C. P.

(*s*) *Edwards v. Omcllhallum*, March, 64. *Rawlyns's case*, 4 Co. 53.

(*t*) *Palmer v. Ekins*, 2 Ld. Raym. 1551; S. C. 2 Stra. 817; 1 Barnard. B. R. 103; 11 Mod. 407. Co. Lit. 352, a. *Parker v. Manning*, 7 Term Rep. 537. *Webb v. Austin*, sup. See also 2 Taunt. 282.

(*u*) *Parker v. Manning*, sup.

Privies in law, as the lord by escheat, tenant by the curtesy, tenant in dower, and others who come under by act in law, or in the *post*, are also bound by, and competent to take advantage of, estoppels (*x*). But if one joint tenant of land take a lease of the same land, by indenture, of a stranger, and die, the survivor is not bound by the conclusion; because he claims above and not under it (*y*).

On the other hand, the lessee, by executing the lease (*z*), and parties claiming under him, are also estopped from impeaching or disputing his landlord's title (*a*); and the rule is founded in good sense, policy, and justice; for if it were otherwise, the tenant might enjoy the property demised, and afterwards defeat the lessor of his remedy for rent. Thus, he cannot plead that there was no demise (*b*), or that the lease is not a good one, for instance, because, being for lives, it could not be granted without livery of seisin, or lease and release, or bargain and sale; or, being a lease of a freehold, it could not commence in futuro (*c*). Even if the lease to him be of his own lands, he cannot during the continuance of the term dispute his lessor's right to demise (*d*). And in a late case (*e*), a lessee of lands within the Bedford Level was estopped from pleading, to an action of covenant for not repairing, that the lease was void for default of registration under 15 Car. 2 (*f*), the object of the Act being to take away the priority of the party whose title was not registered, with

(*x*) Co. Lit. 352, a. b. *Weale v. Lower*, Pollexf. 64. *Palmer v. Ekins*, 2 Ld. Raym. 1551; S. C. 2 Stra. 317; 1 Barnard. B. R. 103. *Trevivian v. Lawrence*, 1 Salk. 276.

(*y*) Co. Lit. 183, a.

(*z*) *Hill v. Saunders*, in error, 4 Barn. & Cress. 534. *Wood v. Day*, 1 J. B. Mo. 389. *Beckett v. Bradley* 8 Scott's N. R. 843.

(*a*) *Winn v. White*, 2 W. Blae. 842. *Attorney-General v. Lord Hotham*, 1 Turn. & Russ. 209, 219; S. C., on appeal, 3 Russ. 415. *Webb v. Austin*, sup.

(*b*) Anon. 1 Leon. 156. Com. Dig. Estoppel, (A. 2.) Co. Lit. 47, b.

(*c*) *Monroe v. Lord Kerry*, 1 Bro. P. C. 334; S. C., Toml. ed., vol. 1, p. 67; Jour. vol. 19, p. 264.

(*d*) *James v. Landon*, Cro. Eliz. 36; S. C. Mo. 81; 4 Co. 54, a. See also *Sutton's case*, Cro. Eliz. 140; S. C. Ow. 96; S. C., nom. *Sutton v. Holloway*, 1 Leon. 206; S. C., nom. *Sutton v. Dixons*, Sav. 98.

(*e*) *Hodson v. Sharpe*, 10 East, 350.

(*f*) 15 Car. 2, c. 17. s. 3.

respect to subsequent claimants whose titles were registered ; but not to operate between the parties themselves, so as to enable a lessee who had enjoyed under it to dispute the lease.

So, if an underlease, executed by the underlessee, contain a covenant by him to pay the rent reserved by the original indenture of lease ; or if the original lease be recited in the underlease ; in either case the Court will estop him from denying the existence of such lease (*g*).

In like manner, the assignee of a lease is concluded by the deed which estops his assignor (*h*). But where a party, plaintiff in replevin, had obtained possession of certain premises from one who had paid rent under distress by the defendant, it was held that, after proof of this fact, the plaintiff was estopped to dispute the defendant's title to the rent, notwithstanding the defendant inadvertently put in evidence a document which showed that the plaintiff's predecessor occupied under a lease to which the defendant was in law a stranger, the legal estate in the premises having been vested in a trustee for the lessor at the time of the demise (*i*). So, where a strip of land was claimed by A. and B. adversely to each other, and B. obtained possession by purchase from the party to whom it had been leased by A., it was held that he had placed himself in the situation of an assignee of the lease, and was estopped from disputing A.'s title (*k*).

But although a lessee may maintain an action of covenant against his lessor on a lease by estoppel (*l*), the same privilege does not extend to his assignee (*m*).

So, although a tenant is precluded from disputing his landlord's title, he is not estopped by the description of the

(*g*) *Atkinson v. Coatsworth*, 8 Mod. 33 ; S. C. 1 Stra. 512. *Jewell v. —*, 1 Rol. 403. *Nash v. Turner*, 1 Esp. 217. *Lainson v. Tremere*, 1 Adol. & Ell. 792 ; S. C. 3 Nev. & Man. 603.

(*h*) *Taylor v. Needham*, 2 Taunt. 273. *Johnson v. Mason*, 1 Esp. 39. *Warburton v. Ivie, Jones*, 1r. Exch. 313.

(*i*) *Cooper v. Blandy*, 1 Bing. N. C. 45 ; S. C. 4 Mo. & Sc. 562. And see *Fleming v. Gooding*, 10 Bing. 549 ; S. C. 4 Mo. & Sc. 455.

(*k*) Doc dem. *Bullen v. Mills*, 2 Adol. & Ell. 17 ; S. C. 4 Nev. & Man. 25.

(*l*) *Style v. Hearing*, Cro. Jac. 73.

(*m*) *Noke v. Awder*, or *Awder v. Nokes*, Cro. Eliz. 373. 136 ; S. C. Mo. 419 ; cited 2 Ld. Raym. 1552.

premises in the lease from showing their real nature; and, therefore, where a lessee covenanted to pay 5*l.* an acre for every acre of meadow he should plough up during the lease, it was held, that he might plead that two pieces of land demised to him, and in the indenture called Laine's meadow, had for sixty years past been arable land, and by times ploughed up and sowed as the tenants thereof thought proper; for the intention was only to covenant against the ploughing up of real meadow; and the court said, that everybody knew that in deeds of this nature the parcels were very often taken from former deeds, without regard to every alteration of the nature of the land; that it would be the hardest case in the world, if the land had been arable at one time, and laid down at another, that the tenant should be concluded by calling it by either of those descriptions; and that it would be carrying estoppels too far to extend them to this case (*n*).

Nor is he estopped from showing that the lessor's title is expired, or otherwise determined: if a different rule prevailed, he might be called upon to pay his rent twice over (*o*). Therefore, where in 1784, a tenant for life, who had a power to lease for twenty-one years, leased for fifty-three years to the defendant, who, in 1813, nine years after the death of the tenant for life, underlet to the plaintiff, and, ten years after the death of the tenant for life, the remainder-man, having given to the plaintiff and defendant notice to quit, granted to the plaintiff a new lease, and received the rent thereon for six years, at the end of which time the defendant, who had acquiesced in the transaction during the interval, distrained on the plaintiff for six years' rent, it was held, that, after this acquiescence, the plaintiff might in an action of replevin plead *non tenuit* to the defendant's avowry under the lease which the plaintiff accepted from him in 1813 (*p*). So,

(*n*) *Skipwith v. Green*, 1 Stra. 610; S. C. 8 Mod. 311; 11 Mod. 338. And see *Birch v. Stephenson*, 3 Taunt. 469.

(*o*) *Fenner v. Duplock*, 2 Bing. 10; S. C. 9 Mo. 38. *Alchorne v. Gomme*, 2 Bing. 54. 60; S. C. 9 Mo. 130.

England dem. Syburn v. Slade, 4 Term Rep. 682. *Doe dem. Jackson v. Ramsbotham*, 3 Mau. & Selw. 516. *Brudnell v. Roberts*, 2 Wils. 143.

(*p*) *Neave v. Moss*, 1 Bing. 360; S. C. 8 Mo. 389.

where a lease was made by a husband and wife seised in right of the wife, for her life, it was held that the lessee might show the determination of the lease by the decease of the wife (*g*) ; and, where made by a disseisor, that he might plead its determination by the re-entry of the disseisee (*r*). So, where A. demised to B. the herbage of his own land, B. was not estopped from saying that A. had nothing in the land, because the lease was not of the land (*s*).

So, if it appear on the face of the declaration that the lease is void, being made, for example, by an attorney in his own, instead of his principal's name, there cannot be an estoppel against the lessee (*t*). And, upon the same principle, where a declaration in covenant for rent in arrear showed that a tenant for life and the reversioner in fee, then an infant, joined as parties in a lease, which at the time was executed by the tenant for life only, and, after his decease, by the reversioner, who had then attained his majority, the court, in answer to an argument that the defendant was estopped by his indenture from pleading the determination of the lease by the death of the tenant for life, resolved that they could not go on the doctrine of estoppel, because it was admitted by the plaintiff's pleadings that the plaintiff did not execute the deed till two years after the death of the tenant for life, upon whose decease the lease was totally void ; and that the subsequent execution by the reversioner could not set up such a lease, nor revive the covenant against the lessee (*u*).

Nor will an estoppel by indenture bar the lessee beyond the duration of the interest derived by him under the lease. Therefore, if a man take a lease for years, by deed indented, of his own land, it is no conclusion beyond the

(*g*) *Blake v. Foster*, 3 Term Rep. 437. *Hill v. Saunders*, in error, 4 Barn. & Cres. 529. *Brudnell v. Roberts*, 2 Wils. 143.

(*r*) *Hilman v. Hore*, Carth. 248.

(*s*) Co. Lit. 47, b. 3 Com. Dig. 273.

(*t*) *Frontin v. Small*, 2 Ld. Raym. 1413 ; S. C. 2 Stra. 705 ; but the point not noticed. And see *Wilks v. Back*, 2 East, 142.

(*u*) *Ludford v. Barber*, 1 Term Rep. 36.

term, at the end of which the lessor (*x*) may enter or occupy the land; for, by the determination of the term, the estoppel is also determined (*y*); though it is difficult, if not impossible, to reconcile Pleadall's case (*z*) with this position. There, a lease was made to father and son for eighty years, and afterwards the father let the land to the son for fifty years, by indenture, upon condition that if the father paid 20*l.* at such a day, &c., the lease should be void, as if it were never made. The condition was performed; the father entered, and devised the land to two others of his sons, and died; they entered upon the son who took the lease, and he re-ousted them, and they brought an ejectment. The opinion of the justices was, that the son who took the lease was estopped to claim any other estate than for fifty years, and that the estoppel continued after the fifty years expired; and thereupon the grand jury found for the plaintiffs, and they recovered their term and damages.

But if a party take an interest in his own lands from a stranger by a matter of record, and not a mere indenture, it appears that the fee will be bound, and the taker estopped for ever (*a*).

A plea which amounts to a special *nil habuit in tenementis* is no more admissible on the part of a lessee by indenture, than a general *nil habuit*, &c.; as if he plead, that the lessor previously to the lease conveyed his fee-simple to a stranger (*b*), or had only an equitable estate in the premises (*c*); because, if such were the case, the plaintiff, in the one case, could have nothing in the premises when he made the lease; and, in the other, no interest of which a Court of Law could take cognizance; nor can he, on a plea of *nil debet*, give in evidence,

(*x*) So in Coke's report, quære, S. C. cited, Cro. Eliz. 36.
lessee?

(*y*) 4 Co. 54, a. James v. Landon, Cro. Eliz. 36; S. C., nom. James case, Mo. 181; S. C., nom. London v. James, 1 And. 128; cited, W. Jo. 459; Lit. 372. Co. Lit. 47, b. 48, a. 3 Bac. Ab. 443.

(*z*) Pleadall's case, 2 Leon. 159;

(*a*) James v. Landon, sup. Pleadall's case, sup. Sutton's case, Cro. Eliz. 140.

(*b*) Palmer v. Ekins, 2 Ld. Raym. 1551; S. C. 2 Stra. 817; 1 Barnard. B. R. 103.

(*c*) Blake v. Foster, 8 Term Rep.

487.

that the plaintiff had nothing in the tenements (*d*). But if *nil habuit in tenementis* be pleaded to an action of debt for rent on an indenture, the plaintiff is not under the necessity of replying the estoppel; but may demur generally (*e*); because the declaration is on the indenture, and the estoppel appears on the record; it is otherwise if he declare *quod cum dimisisset* (*f*). Nor does such demurrer amount to a confession that the plaintiff had nothing in the lands; for what is ill pleaded a demurrer does not confess (*g*). If the plaintiff will neither reply on the estoppel, nor demur, but reply *habuit*, &c., he waives the estoppel, and leaves it at large, and the jury may find the truth notwithstanding his indenture (*h*).

On this last point, whether a jury is bound by the estoppel; in other words, whether they are precluded from finding by their verdict the fact of the lessor having no interest in the premises, the early cases show that much doubt prevailed (*i*); but the better opinion appears to be that they are not precluded (*k*). Estoppels, says Lord Coke (*l*), which bind the interest of the land, as the taking of a lease of a man's own land by deed indented, and the like, being specially found by the jury, the court ought to judge according to the special matter; for albeit estoppels regularly must be pleaded and relied upon by an apt conclusion, and the jury is sworn *ad veritatem dicendam*, yet when they find *veritatem facti* they

(*d*) *Trevilian v. Lawrence*, 1 Salk. 277; S. C. 3 Salk. 151; Holt, 282; 6 Mod. 256.

(*e*) *Kemp v. Goodal*, 1 Salk. 277. *Palmer v. Ekins*, 2 Stra. 317; S. C. *Barnard. K. B.* 103; 2 Ld. Raym. 1553.

(*f*) *Kemp v. Goodal*, sup.

(*g*) *Palmer v. Ekins*, sup.

(*h*) *Trevilian v. Lawrence*, 1 Salk. 277; S. C. 3 Salk. 151; Holt, 282; 6 Mod. 256; 2 Ld. Raym. 1036. 1043. *Com. Dig. Estoppel*, (C).

(*i*) *James v. Landon*, Cro. Eliz. 36;

S. C., nom. *James case*, Mo. 131; S. C., nom. *London v. James*, 1 And. 123; cited, W. Jo. 459; Lit. 372. *Sutton's case*, Cro. Eliz. 140; S. C. *Ow.* 96; S. C., nom. *Sutton v. Holloway*, 1 Leon. 206; S. C., nom. *Sutton v. Diceons*, Sav. 98. *Rawlyns's case*, 4 Co. 53, a. b. *Pleadall's case*, Mo. 96; cited, Cro. Eliz. 36. *Isham v. Morrice*, Cro. Car. 109; S. C., nom. *Norris v. Isham*, Hetl. 82; cited, Cart. 155. *Jenk. Cent.* 254, case, 46.

(*k*) *Ibid.*

(*l*) Co. Lit. 227, a.

pursue well their oath, and the Court ought to adjudge according to law.

An estoppel against an estoppel sets the matter at large (*m*).

III.—*Tenant in Fee-simple.*

It is a general, but not a universal rule (*n*), that leases may be made for any term short of the estate of the lessor (*o*). A person seised of a fee-simple may, therefore, in general, make leases for any term or number of years without limit or restraint, which will be binding on his heirs, and all others claiming under him (*p*). Anciently, as we have already had occasion to remark (*q*), a lease could not have been made to endure for above forty years; the law, however, appears to have become soon antiquated (*r*).

IV.—*Tenant in Tail.*

Leases by tenant in tail, depending on the peculiar qualities of the ownership of the lessor, and being regulated in a great degree by the provisions of legislative enactment, require a more lengthened notice.

At common law, an estate tail, though capable of being converted into a fee-simple, conferred on the owner rights and privileges scarcely greater than those exercisable by a mere tenant for life. His alienation in fee by an innocent conveyance, such as lease and release, bargain and sale enrolled, or covenant to stand seised, was voidable on his decease by the entry of the issue claiming under the entail, or by the reversioner or remainder-man (*s*). His leases for years

(*m*) Com. Dig. Estoppel, (E. 9).

(*n*) See as to leases by corporations, ecclesiastical and civil, post, Sect. IV. of this Chapter.

(*o*) As to the necessity for a reversion being left in the lessor, see ante, p. 9.

(*p*) Com. Dig. Estates, (G. 2.).

(*q*) Introductory remarks, ante, p. 2.

(*r*) 2 Bla. Com. 142.

(*s*) *Machell v. Clarke*, 2 Ld. Raym. 778; S. C., nom. *Matchel v. Clerk*, 11 Mod. 19; S. C., nom. *Machil v. Clerk*, or *Clark*, Holt, 615; 2 Salk. 619. *Seymour's case*, 10 Co. 95, b.

were not of a more permanent nature (*t*), the interest they conferred being in like manner determinable by the succeeding tenant in tail, or remainder-man, or reversioner. Equity had no power to compel the issue, though in the enjoyment of large assets, both real and personal, to confirm his ancestor's lease. He might at his pleasure assume the possession; and say, "it is my absolute will as owner of this estate to defeat the leases: the satisfaction of the lessees must be measured by damages; but I choose to enter into possession" (*u*).

The serious inconveniences to which lessees were exposed from their lessors being secretly tenants in tail at length attracted the attention of the legislature, and a remedy, an insufficient one indeed, was provided by the statute 32 Hen. 8. c. 28, commonly called the *enabling statute*, and entitled, "Lessees to enjoy the farm against the tenants in tail." After reciting that "where great numbers of the king's subjects have heretofore taken leases of lands, tenements, and other hereditaments, for term of years, and divers of them for term of lives, and have given and paid great fines and great sums for the same, and also have been at great costs and charges as well in and about great reparations and buildings upon their said farms, as otherwise concerning their said farms; yet notwithstanding the said fermors, after the death or resignations of their lessors, have been and be daily with great cruelty expelled and put out of their said farms and takings by the heirs or successors of their said lessors, or by such persons as have interest therein after the deaths or resignations of their said lessors, by reason of privy gifts of intail, or for that the lessors had nothing in the lands tenements or other hereditaments so let at the time of the leases thereof made but only in the right of their wives, or such other like cause, to the great impoverishment and in matter

(*t*) *Ex parte Smyth*, 1 Swanst. 356.
1 Dy. 51, b. pl. (17). 7 Co. 9, a.
Case of the Queensbury leases, 1 Bli.
P. C. 453.

(*u*) *Lady Cavan v. Pulteney*, Earl
of Darlington *v.* Pulteney, 2 Ves. jun.
562; S. C. 3 Ves. 384.

utter undoing of the said fermors ;” it was enacted, that, for reformation thereof, all leases thereafter to be made of any manors, lands, tenements, or other hereditaments, by writing indented under seal, for term of years, or term of life, by any person or persons being of full age of twenty-one years, having any estate of inheritance either in fee-simple or in fee-tail, in their own right, or in the right of their churches or wives, or jointly with their wives, of any estate of inheritance made before the coverture or after, should be good and effectual in the law against the lessors, their wives, heirs, and successors, and every of them, according to such estate as should be comprised and specified in every such indenture of lease, in like manner and form as the same should have been if the lessors thereof, and every of them, at the time of the making of such leases, had been lawfully seised of the same lands, tenements, and hereditaments, comprised in such indenture, of a good, perfect, and pure estate of fee-simple thereof to their own only uses.

It was provided, however, that the act should not extend to any leases to be made of any manors, lands, tenements, or hereditaments, being in the hands of any fermor or fermors by virtue of any old lease, unless the same old lease should be expired, surrendered, or ended, within one year next after the making of the said new lease ; nor should extend to any grant to be made of any reversion of any manors, lands, tenements, or hereditaments, which had not most commonly been let to farm, or occupied by the fermors thereof, by the space of twenty-one years next before such lease thereof made ; nor to any lease to be made without impeachment of waste ; nor to any lease to be made above the number of twenty-one years or three lives at the most from the day of making thereof ; and that upon every such lease there should be reserved yearly during the same lease, due and payable to the lessors, their heirs and successors, to whom the same lands should have come after the deaths of the lessors, if no such lease had been thereof made, and to whom the reversion thereof should appertain, according to their estates and

interests, so much yearly ferm or rent, or more, as had been most accustomedly yielded or paid for the manors, lands, tenements, or hereditaments, so to be let, within twenty years next before such lease thereof made; and that every such person and persons to whom the reversion of such manors, lands, tenements, or hereditaments, so to be let should appertain as aforesaid, after the deaths of such lessors, or their heirs, should and might have such like remedy and advantage to all intents and purposes against the lessees thereof, their executors and assigns, as the same lessor should or might have had against the same lessees. So that if the lessor were seised of any special estate tail of the same hereditaments at the time of such lease, the issue or heir of that special estate should have the reversion, rents, and services, reserved upon such lease after the death of the said lessor, as the lessor himself might or ought to have had if he had lived (*x*).

The restrictions under which tenants in tail are by this statute enabled to lease have been virtually, though not expressly, relaxed by the late act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance (*y*). But, as the enactment of Henry the 8th is still in full force with regard to existing leases made by tenants in tail under its authority, and may also operate upon such demises as are not sanctioned by the statute of William the 4th, it is of great importance that its provisions be understood; for which purpose it is intended in this place to enter into a detailed examination of its construction. And, as some of the requisites prescribed by it extend alike to leases granted by tenants in tail, by ecclesiastical corporations, and by husbands and wives seised in right of their wives, it

(*x*) Soon after the great fire of London, all persons seised of or interested in any house or houses burnt or destroyed by reason of the said fire, in tail, for life or lives, or years determinable upon life, with remainder to their heirs or issue male or female, or to their first or other son or sons, daughter or daughters, in tail, or other like estate, were empowered by 22

Car. 2. c. 11. s. 79, by indenture under their respective hands and seals, to demise the ground or soil of such burned or demolished houses, without any fine or fines, and at the most improved annual rent, to any person or persons that would rebuild thereon, for any term of years not exceeding fifty years.

(*y*) 3 & 4 W. 4. c. 74.

is proposed, with a view to prevent repetition, to notice such of them as affect indiscriminately, or illustrate the law connected with, these several classes of lessors, reserving for separate consideration the particular clauses exclusively applicable to the various persons subject to its operation.

Whether it was the intention of Parliament to secure the enjoyment of the lessee against the eviction as well of the reversioner or remainder-man, as of the issue in tail, after the lessor's decease, cannot at this distance of time be ascertained. The words in the act appear to be sufficiently comprehensive for the purpose; and within a twelvemonth after it was passed the question was agitated, and apparently decided in favor of the lessee (*z*); but the right of the reversioner and remainder-man to eject the lessee of the tenant in tail, on the decease of the latter without issue inheritable to the estate tail, has since been incontrovertibly established (*a*), on the ground that as the interest is derived from the estate tail, it can endure no longer than the continuance of the principal estate (*b*).

In modern practice, however, by means of powers of leasing, to which attention will be given in a future part of this work (*c*), the imperfect operation of the act in this particular has found an adequate remedy, independently of the statute, 3 & 4 W. 4, c. 74.

To avail himself of the enabling act of 32 Hen. 8, the lessor must be seised of a vested estate tail; for if a gift be made to a husband and wife, and the heirs of the body of the survivor, a lease made pending the contingency of survivorship will not bind the issue (*d*). And it appears that neither a tenant in tail after possibility of issue extinct, whose estate for most purposes corresponds with that of a mere tenant for life (*e*), nor a

(*z*) Earl of Bridgewater's case, Dy. 43, b.

(*a*) 8 Co. 34, a. Windham's case, Noy, 6. Woodroff v. Greenwood, Noy, 56. B. N. C. pl. 370. Reeve v. Cox, Noy, 66. Dy. 43, b. n. Keen v. Cope, Cro. Eliz. 602. Co. Lit. 44, a. 45, b. Bayley v. Warburton, Com. 494.

(*b*) 8 Co. 34, a. Bayley v. Warburton, sup.

(*c*) Post, as to leases by donee of power.

(*d*) Lampet's case, 10 Co. 51, a. Co. Lit. 26, a. But see 3 & 9 Viet. c. 106. s. 6, ante, p. 49.

(*e*) Bowles's case, 11 Co. 79, b. 30, a.,

widow tenant in tail *ex provisione viri* (*f*), is within its scope. But the circumstance of the reversion being in the Crown will not prevent a tenant in tail from leasing by virtue of the act (*g*).

The lease must also be made by indenture under seal by a party of full age. A parol lease (*h*), or lease by deed poll, will not answer the purpose (*i*). But it was said by Sir H. Gwillim, that the mere defect of the form of indenting the deed would not affect its validity, for it might even be done in court; and that such a trifling omission would not furnish a ground for exception (*k*).

It is laid down by Lord Coke (*l*), that the lease must be of lands, tenements, or hereditaments, manurable or corporeal, which are necessary to be letten, and whereout a rent by law may be reserved, and not of things that lie in grant, as advowsons, fairs, markets, franchises, and the like, whereout a rent cannot be reserved.

It appears, however, that tithes, though incorporeal, might be demised for years within the act; for, notwithstanding Lord Coke's authority to the contrary (*m*), little doubt is entertained of the validity, at common law, of a reservation of rent on a lease for years by ecclesiastical persons of their tithes (*n*). The rent ran with the reversion in favor of the successor, and was recoverable by an action of debt from an

S. C., nom. *Bowles v. Berrie*, 1 Rol. 177. Co. Lit. 23, a.

(*f*) *Crocker, or Croker, v. Kelsey*, Cro. Jac. 683; S. C. W. Jo. 60; Hutt. 34; J. Bridgm. 27; 2 Rol. 490. 493; Bendl. 143. *Bettison v. Elways*, Skin. 31. 36; S. C. 2 Show. 193. *Waters v. Rumsey*, 3 Keb. 333.

(*g*) O. Bridgm. by Bann. 106.

(*h*) All leases required by law to be in writing, of any tenements or hereditaments, must now be made by deed. See 3 & 9 Viet. c. 106. s. 3. See further on this subject, post, Part V. Chap. I.

(*i*) Co. Lit. 44, a. The late act of 3 & 4 W. 4. c. 74, to be noticed here-

after, only requires a *deed*, not an *indenture*.

(*k*) 4 Bac. Ab. 7th Ed. Leases, (E.) 2. n. (*a*), p. 687. But see Co. Lit. 143, b. 229, a. *Stile's case*, 5 Co. 20, b.; S. C., nom. *Frampton v. Stiles*, Cro. Eliz. 472.

(*l*) Co. Lit. 44, b. 47, a. 142, a. And see *Jewel's case*, 5 Co. 3, a. *Smith v. Bowles*, 2 Rol. Ab. 451. (O).

(*m*) Co. Lit. 47, a.

(*n*) *Talentine v. Denton*, Cro. Jac. 111. 112; S. C. Mo. 773; cited, T. Raym. 167. *Rickman v. Garth*, Cro. Jac. 173. *Dobitofte v. Curteene*, Cro. Jac. 452-3. *Ensden v. Denny*, Palm. 105. See, however, the preamble of the act, 5 Geo. 3. c. 17.

assignee of the lease (*o*). And lay impropiators derived under the statute, 32 Hen. 8. c. 7 (*p*), rights of ownership over their tithes similar to those exercisable by them over their corporeal hereditaments. Thus, it appears that spiritual owners of tithes, at common law, and, after the statute just named, lay tenants in tail of tithes, or husbands seised of tithes in right of their wives, or jointly with their wives, could lease the same for years so as to bind the successor, issue in tail, or surviving wife, by virtue of the act, 32 Hen. 8. c. 28. Still, as an action of debt was not maintainable at common law for rent reserved on a freehold lease during its continuance (*q*), the inability of the persons within the last named act to lease their tithes for a life or lives continued, until removed, as to lay persons, by a statute of Queen Anne (*r*), which gave the remedy of an action of debt for arrears of rent upon freehold demises; and, as to spiritual persons, by the act, 5 Geo. 3. c. 17 (*s*), which enacted, that all leases for one, two, or three, life or lives, or any term not exceeding 21 years, then already granted, or which should thereafter be granted, of any tithes, tolls, or other incorporeal hereditaments, solely and without any lands or corporeal hereditaments, by any archbishop or bishop, master and fellows, or other head and members, of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, and every other person and persons who were enabled by the several statutes then in being, or any of them, to make any lease or leases for one, two, or three, life or lives, or any term or number of years not exceeding 21 years, of any corporeal hereditaments, should be as good and effectual against the persons granting the same, and their successors, as any leases made or to be made by them of any corporeal hereditaments by

(*o*) Ibid. *Tippin v. Grover*, T. Raym. 18. *The Dean and Chapter of Windsor v. Gover, or Gower*, 2 Saund. 302; S. C. T. Raym. 194; 1 Vent. 98; 1 Lev. 308; 2 Keb. 688. 727. 737. 775. *Dalston v. Reeve*, 1 Ld. Raym. 77. *Bally v. Wells*, 3 Wils. 32; S. C. Wilm. 341.

(*p*) 32 Hen. 8. c. 7. s. 7, confirmed and enlarged by 2 & 3 Ed. 6. c. 13.

(*q*) 3 Bla. Com. 232. And see the cases cited ante.

(*r*) 8 Anne, c. 14, s. 4.

(*s*) 5 Geo. 3. c. 17.

virtue of the statute, 32 Hen. 8. c. 28, or any other statute then in being; provided (*t*) that leases should not be granted for larger terms than were allowed by the local statutes of the several foundations. And the act empowered (*u*) the lessors to recover by an action of debt all arrears of rent on leases made or to be made, as landlords might on leases for years.

Whether advowsons, fairs, markets, franchises, and other incorporeal hereditaments of the like nature, are demisable under the enabling statute of Hen. 8th, is not clear (*x*). In Jewel's case (*y*) it was laid down, that a lease by a bishop of a fair, parcel of the possessions of his bishopric, with all profits thereof, (whether for life or lives, or for years, was deemed immaterial,) was not available against his successor, since neither lessor nor successor had any remedy by distress or assize for the rent reserved. But the case of *Talentine v. Denton* (*z*), confirmed by much later decision (*a*), is of a different complexion.

Leases of copyholds, as they pass by surrender, and not by indenture, are not within the act (*b*), unless, perhaps, the demise be made with the license of the lord (*c*).

The 2nd section of the act prohibits its application to reversionary leases, unless the old lease be expired, surrendered, or ended, within one year next after the making of the new lease. For this purpose, a surrender in law is sufficient (*d*). The act does not, in general, admit of a conditional surrender (*e*); but the tenant may safely retain a power over his old estate until the new one be granted, by adopting the pre-

(*t*) Sect. 2.

(*u*) Sect. 3.

(*x*) Chambers on Leases, p. 248.

(*y*) Jewel's case, 5 Co. 3, a.

(*z*) *Talentine v. Denton*, Cro. Jac. 111, 112; S. C. Mo. 778; cited, T. Raym. 167. And see *The Dean and Chapter of Windsor v. Gover*, or *Gower*, 2 Saund. 304; S. C. T. Raym. 194; 1 Lev. 308; 2 Keb. 688. 727, 737. 775. Anon. 1 Vent. 98, semb. S. C.

(*a*) *Bally v. Wells*, 3 Wils. 25, 32; S. C. Wilm. 341.

(*b*) *Rowden v. Malster*, Cro. Car. 44. Gilb. Ten. 166, ed. 1730. *Winter v. Loveder*, Comb. 371. And see Anon. 1 Leon. 4.

(*c*) Gilb. Ten. 167. Watk. Cop. vol. 2, p. 194, n. (g). 3rd ed.

(*d*) *Thompson, or Tompson, v. Trafford*, Poph. 8; S. C. 2 Leon. 138. Plowd. 106. And see *Grumbrell v. Roper*, 3 Barn. & Ald. 711.

(*e*) *Elmer's case*, 5 Co. 2, a.; S. C., nom. *Elmor v. Geale*, Mo. 253.

caution of a condition to avoid the surrender on the lessor's refusal or omission to grant the latter at the time specified; because whether the conditional surrender be good or no, on the grant of the new lease, the surrender becomes absolute, both in deed and in law; the lessee's former interest is ended without the necessity of any further act on his part, and the terms of the statute are complied with (*f*).

Where a tenant in tail made a lease for life to a feme covert, whose husband surrendered it, and then the tenant in tail made a lease for three lives, and died, and the wife after the decease of her husband entered, and died, the court held that the issue could not avoid the lease for three lives (*g*).

The lands must also have been most commonly letten to ferm or occupied by the fermors thereof for the space of twenty years next before the lease thereof made. The object of this clause was to prevent the parties enabled by the act from demising their mansion houses and demesne lands so as to bind their successors, and thus diminish ancient hospitality (*h*); and the better construction of it seems to be, that it consists of two parts in the disjunctive, and if either of them be observed, it is sufficient to support the lease. The words are, that "the act shall not extend to any lease of any manor, lands, &c. which have not most commonly been letten to ferm;" this is the first part of the disjunctive, and is general; the other part is, "or occupied by the fermors thereof by the space of twenty years," and it is said that the most natural and genuine meaning of the clause is, that the lands to be leased must either be such as have been most commonly letten, that is, such as are not reputed part of the demesnes; or such as have been occupied by the fermors thereof by the space of twenty years (*i*).

The words "most commonly letten, &c." seem to be satisfied if the lands have been demised, at one time, or at several times, for the greater part of the twenty years next preceding

(*f*) *Wilson dem. Eyre v. Carter*, Lease, E. Rule, 6. And see *Pemble v. Sterne*, T. Raym. 165; 1 Lev. 212; 2 Stra. 1201.

(*g*) *Sydenham v. Caps*, Mo. 783. 1 Sid. 316. 416; 2 Keb. 213. 230. 325.

(*h*) 4 Cru. Dig. 70. 4th ed. 440. 448. 460. 464. 484. 525.

(*i*) 4 Cru. Dig. 70. Bac. Ab. ut.

the intended lease (*k*). And it is immaterial whether the letting has been for life, or lives, or years, or at will, at common law, or by copy of court roll (*l*).

In order to bring the lands within the term "commonly letten," the previous demises must have been by persons having an estate of inheritance; and it has accordingly been held that a lease for twenty years by the guardian in chivalry (*m*) of an infant tenant in tail of lands never before demised; or by the dowress of tenant in tail; or by the husband tenant by the curtesy of an estate tail; was not such a letting as would enable the issue in tail, when of age, to lease under the statute (*n*).

A lease made without excepting trees, such exception having been made in all former leases, will not bind the successor; for, by the omission of the exception, not only the trees, and the profits of the trees, pass, but the soil itself passes to the lessee; and, consequently, as more is let than usual, the lease is not protected by the statute (*o*). But if distinct premises be comprised in the lease, of which some only have been let for the greater part of twenty years before, with several reservations, and several words in the habendum, the instrument is tantamount to a distinct lease of each distinct set of parcels, and operates as a valid demise of those lands which the tenant in tail is empowered by the statute to lease (*p*).

The lease must not be made without impeachment of waste; and, hence, a lease for life, remainder for life, was not warranted by the statute, because it was punishable

(*k*) *Mallet v. Mallet*, Cro. Eliz. 707. And see *Pemble v. Sterne*, sup. Co. Lit. 44, b.

(*l*) Co. Lit. 44, b. *Dean and Chapter of Worcester's case*, 6 Co. 37, a. b. *Baugh v. Haynes*, Cro. Jac. 76. T. Jo. 29. *Banks v. Brown*, Mo. 759; S. C. Noy, 110. *The Lord Norris's case*, Noy, 106.

(*m*) Guardianship in Chivalry was abolished by the Statute, 12 Car. 2. c. 24.

(*n*) Anon. 3 Dy. 271, b. pl. (28). Co. Lit. 44, b.

(*o*) *Smith v. Bole*, or *Bowles*, Cro. Jac. 458; S. C. 3 Bulstr. 290; cited, 3 Mau. & Selw. 108.

(*p*) *Tanfield v. Rogers*, Cro. Eliz. 340; S. C. Ow. 119. See also *Winter's case*, 3 Dy. 308, b. *Knight's case*, or *Knight v. Breech*, *Brech*, *Breach*, or *Beeche*, 5 Co. 54, b.; S. C. 1 And. 173; Mo. 199; 3 Leon. 124; Gouldsb. 15.

of waste (*q*), in consequence of the interposed remainder (*r*); but a lease to one for three lives was good, for the lessee might be punished for waste (*s*).

The term warranted by the statute extends to twenty-one years *or* three lives, from the day of making thereof; not twenty-one years *and* three lives (*t*); therefore, if, during the continuance of an existing lease for years, a new one be granted for lives, the second will be void, though one year only of the first be unexpired; because it is against the express words of the statute that there should be both a lease for years and a lease for lives in being at the same time against those who are to succeed (*u*). So, if the second lease be for lives, the first lease must be surrendered and gone before the making of the new lease; but if the lease for life be made at the common law, a surrender of the prior lease before livery will make the second lease binding on the successor, because it is no complete lease before livery, and before that the first lease is surrendered and gone (*x*).

The lease will be equally valid whether it be granted to one for three lives, or to three for their three lives (*y*); though, as we have seen (*z*), a lease to A. for life, remainder to B. for life, remainder to C. for life, could not be supported, because it would have been dispendishable of waste.

It appears to be the better opinion, founded on the decision in Whitlock's case (*a*), that the statute of Henry the 8th will justify a lease for ninety-nine years if three persons shall so long live (*b*). In that case, the Court took a distinction

(*q*) The writ of waste was abolished by the act, 3 & 4 W. 4. c. 27. s. 36.

(*r*) Co. Lit. 44, b. Dean and Chapter of Worcester's case, 6 Co. 37, a. Owen v. App Rees, Cro. Car. 94; S. C., nom. Owen v. Price, Hetl. 22. Berry v. White, O. Bridgm. by Bann. 99.

(*s*) Ibid.

(*t*) Co. Lit. 44, b.

(*u*) Chambers on Leases, p. 231-2. Small's case, Degge's Pars. Couns. 130. Marlar v. Wright, cited, Mo. 253; and 10 East, 184. 1 Leon. 148.

(*x*) Ibid.

(*y*) Baugh v. Haynes, Cro. Jac. 76.

(*z*) Sup, p. 74.

(*a*) Whitlock's case, 8 Co 69, b. See also Roe dem. Brune v. Prideaux, 10 East, 158. 186. Lutwich v. Piggot, 3 Mod. 268.

(*b*) The difference between the construction of this statute, and of the restraining statutes, 1 & 13 Eliz., will be noticed in treating of leases by ecclesiastical corporations.

between a particular power affirmative, as a power to lease for three lives or twenty-one years; and a general power restrained by a negative, as a power to lease so that the term granted shall not exceed so many lives or years; and it was agreed, that the donee of a power of the former kind could not make a lease for ninety-nine years determinable on three lives; though a power of the latter description (resembling which is the power conferred by the statute of Henry the 8th) would authorize such a lease, the first part of the clause being general, and the latter part only restraining leases exceeding three lives or twenty-one years.

The case of *Smith v. Trinder* (c) involved the point. A husband, having purchased lands to him and his wife and their heirs, alone leased the lands for three score years, if they should so long live; the case was not pressed to a decision; but no objection was made to the lease on the ground of its non-compliance with the terms of the statute. And in a later case (d) the Court refused to dispute whether a bishop's lease for ninety-nine years determinable on three lives were good or not.

Lord Hardwicke, however, was of opinion that the statute would not authorize a lease otherwise than for twenty-one years, or for three lives, absolutely (e).

Unless the lease be good in its creation, no subsequent event can give it validity. If it be made for four lives, instead of three, and one of the cestuis que vie die in the lessor's lifetime, the successor will not be bound (f).

It needs scarcely to be mentioned that a lease for a less term than three lives or twenty-one years may be granted (g).

It is necessary that the lease be made to commence from the day of the making; for should the term be computed from

(c) *Smith v. Trinder*, Cro. Car. 22.

(d) *Thredneedle v. Lyncham*, Line, Lynum, or Linum, 3 Keb. 595; S. C. Pollexf. 176-9. 1 Freem. 92, 119, 165. 179.

(e) *Glanville v. Payne*, 2 Atk. 40; S. C. Barnard. Ch. 13. *Paget v. Gee*,

Ambl. 199, 200. And see *Shep. Touch.* by Prest. 277. n. (22).

(f) *The Bishop of Salisbury's case*, 10 Co. 62, a.

(g) 5 Co. 6, a, b. *Carter v. Claycole*, 1 Leon. 306. Per *Peryam* in *Fox v. Collier*, O. Bridgm. by Bam. 92. n. (f).

a future (*h*), or even a preceding day (*i*), the demise will be void against the parties entitled to the reversion after the lessor's death, although it would not exceed in duration the period allowed by the statute. Thus, a lease to commence after the lessor's death (*k*), or for nineteen years to commence two years after the making, notwithstanding the appearance of authority to the contrary (*l*), cannot be supported (*m*).

So much yearly ferm or rent or more as hath been most accustomedly yielded or paid for the manors, &c., so to be letten within twenty years next before such lease thereof made, must be reserved yearly during the same lease (*n*). The lands must have been usually let before; otherwise the ancient rent cannot be reserved (*o*); and, therefore, if twenty acres of land have been accustomedly letten, and a lease be made of those twenty, and of one acre which was not accustomedly letten, reserving the accustomed yearly rent, and so much more as exceeds the value of that acre, the lease is not warranted by the act, for the accustomed rent is not reserved, because part was not accustomedly letten, and the rent issues out of the whole (*p*). If there be distinct reservations, the case is different (*q*). So, if a lease be made by tenant in tail, comprising leaseholds for lives, as well as the entailed lands, and reserving an entire rent, it is void for the

(*h*) *Symonds v. Cudmore*, Carth. 260; *S. C.* Holt, 666; *Skin.* 284. 317. 328; 4 *Mod.* 1; 12 *Mod.* 32; 1 *Salk.* 338; 3 *Salk.* 335; 1 *Show.* 370; 1 *Freem.* 310. 503. *Griffin v. Stanhope*, *Cro. Jac.* 454; 2 *Ld. Raym.* 781. *Dy.* 279, a. pl. (7). *Opee*, or *Opy*, *v. Thomasius*, 1 *Sid.* 261; *S. C. T. Raym.* 132; 1 *Keb.* 778. 910. *Prince v. Green*, *Toth.* 193, numbered 225 by mistake.

(*i*) *Dal.* 74. pl. 58.

(*k*) *Anon.* 3 *Dy.* 279, a. pl. (7). *Griffin v. Stanhope*, *sup.* *Machell v. Clarke*, 2 *Ld. Raym.* 781. *Symonds v. Cudmore*, 12 *Mod.* 32. *Opee*, or *Opy*, *v. Thomasius*, *sup.*

(*l*) *Anon.* 2 *Dy.* 246, a. pl. (69). 1 *Leon.* 148.

(*m*) *Dal.* 74. pl. 58. *Dean and Chapter of Westminster's case*, *Cart.* 150. As to the construction of the words "from the date," and the like, see post, *Habendum*.

(*n*) In a future page relating to leases under powers, the reader will find some further remarks on the words *ancient and accustomed rent*.

(*o*) *The Bishop of Hereford v. Scory*, *Cro. Eliz.* 874. *Doe dem. Tennyson v. Lord Yarborough*, 1 *Bing.* 24; *S. C.* 7 *Mo.* 248.

(*p*) *Co. Lit.* 44, b. *Mountjoy's case*, 5 *Co.* 3, b. 5, b., 2nd resolution; *S. C.* *Mo.* 197. *Doe dem. Bartlett v. Rendle*, 3 *Mau. & Selw.* 99. 108.

(*q*) *Tanfield v. Rogers*, *Cro. Eliz.* 340. 2 *Vern.* 543. *Ley*, 74. 77.

whole; nor will the fact of the lands having been immemorially holden together alter the case (*r*). So, where a lease was made by a prebendary of the prebend, without excepting all crab-trees and such like trees, such exception having been made in all former leases, and the former rent was reserved, the lease was held to be void against the successor; for it was not the ancient rent where more was demised than had been let before (*s*). A lease even by a college to try a title cannot be supported, unless the accustomed rent be reserved (*t*).

In a late case (*u*) under the restraining statutes, a vicar, with the consent of the patron and ordinary, leased a piece of the vicarage land, which, on account of the expense, had not been fenced in the memory of man, and was consequently unproductive, for three lives, at the best annual rent that could be obtained, reserving a right of entry in case of non-payment; and the lessee covenanted, among other things, to inclose the demised premises. It was argued that the object of the legislature was, to secure to the successor the accustomed rent where any rent had existed before; and where not, the best rent that could be gotten: but the Court were clearly of opinion that a lease of lands which had never been letten before could not be reconciled with the words of the statute 13 Eliz. c. 10. s. 3, that all leases by any vicar, "other than for the term of one and twenty years or three lives"—"whereupon the accustomed yearly rent or more shall be reserved"—"shall be utterly void." They said that the case was not distinguishable from the Bishop of Hereford *v.* Scory (*x*), and that their decision must proceed on the statutes taken together.

If two coparceners be seised in tail of land which has been let for 10*l.*, one of them may let her moiety for 5*l.*; for,

(*r*) Rees dem. Perkins *v.* Phillip, Wightw. 69.

(*s*) Smith *v.* Bole, or Bowles, Cro. Jac. 458; S. C. 3 Bulstr. 290; cited, 3 Mau. & Schw. 108.

(*t*) Carter *v.* Cleypool, Mo. 593; S. C., nom. Carter *v.* Claypole, 1 Leon.

306; S. C., nom. Carter *v.* Crumwell, 1 And. 248.

(*u*) Doe dem. Tennyson *v.* Lord Yarborough, 1 Bing. 24; S. C. 7 Mo. 248.

(*x*) Cro. Eliz. 874.

although differing in form or quality, the rent is in substance the true and ancient rent within the statute (*y*).

The ancient rent must also be reserved during the whole term to the lessor himself, as well as to the successors. If he reserves a less rent to himself during his life, and after his death the true and ancient rent, the lease will not be good (*z*); though, perhaps, the lessor might release the rent as to himself, without impairing the efficacy of the lease as against the succeeding reversioner (*a*).

Where a manor belonging to a bishop's see was usually leased out for lives, at a rent of 49*l.* 3*s.* 4*d.*, and one of the bishops, on renewing the lease, excepted the demesnes, which were of the value of 32*l.* 11*s.* 1*d.*, reserving, however, the full ancient rent of 49*l.* 3*s.* 4*d.*, and afterwards accepted a rent of 16*l.* 12*s.* 3*d.*, being the proportion after deducting for the demesnes, in full of the whole reserved rent, the acceptance was held not to bind his successor, but that he was entitled to the full rent reserved by the lease (*b*).

As it was evidently the object of the legislature to carry the rent to the person entitled to the reversion, the courts will so construe a lease as best to effectuate that intention. Thus, where tenant in tail to him and his heirs male of his body had issue two sons by two different venters, and died, and the eldest son entered, and made a lease for twenty-one years, reserving rent generally to himself, his heirs and assigns, during the term (*c*), and died without issue, having two sisters, his heirs at law, and a question arose whether by this reservation the rent belonged to the second brother, to whom the reversion descended, as heir male of the body of the father, it was held that the rent would go along with the reversion, and that the lease was a good lease. The statute (said

(*y*) Mountjoy's case, 5 Co. 5, a. b. Co. Lit. 44, b.

(*z*) Mountjoy's case, 5 Co. 6, a.; 6th resolution; S. C. Mo. 197. See, however, Hardr. 90. 93, cont.

(*a*) 2 Rol. 403. 407. Dy. 123, a. 304, a. pl. (53). Ley, 78.

(*b*) Dyke v. The Bishop of Bath and Wells, 1 Bro. P. C. 502; Toml. ed. vol. 6, p. 36; Jour. vol. 20, p. 58.

(*c*) The words "during the term" are not in the body of the report, but are noticed in the judgment of the court as being inserted in the lease.

the court) is an enabling law ; and the question here depends upon the proviso, which says, that the rent shall be reserved to the lessor and his heirs, or those to whom the lands would go if no such lease had been made : and, in the exposition of statutes, the judges must make such a construction as to advance, and not to frustrate, the intention of the makers. Now, their intent was, that the rent should go along with the reversion, and the lease be good, if by any reasonable construction in law it might be so : and so it may be here, for rent does naturally follow the reversion, and the second brother is heir to the estate (*d*) ; but where a lease was made by one of two coparceners in tail, and by the husband being tenant by the curtesy of the other coparcener deceased, rendering rent to them and their heirs, the lease was considered void within the statute, the reservation not being to the donee and her heirs, but to the tenant by the curtesy jointly with the other (*e*).

So, where lands were given to the husband and wife, and to the heirs of their two bodies, and the husband died leaving issue by his wife, and the wife made a lease of the lands according to the statute of Henry the 8th, it was clearly held that the issue were bound by the lease, although the statute said that the lease should be good against the lessor and his heirs, and the issue did not claim as heir to the wife only, but as heirs of the bodies of the husband and wife (*f*).

So, where tenant by the curtesy and the heir in reversion in tail concurred in granting a lease, rendering rent to them and their heirs, the general reservation was held to withdraw the lease from the protection of the statute (*g*).

Casual and accidental services, such as heriots, and the like, are not comprehended within the term *rent*. A dean and chapter being seised of a manor, whereof the land in question was copyhold, demisable for three lives, rendering eight shillings rent, at the four feasts, and heriotable upon the death

(*d*) *Cother v. Merriek*, Hardr. 89.

(*e*) *Thomson's case*, Latch, 45.

(*f*) *Anon.* Godb, 102. pl. 119.

(*g*) *Stacy v. Clark*, or *Clerk*, cited, Latch, 257 ; Palm. 484.

of every tenant dying in possession, let this land by indenture for three lives, rendering eight shillings rent, at two feasts, without reserving any heriot; and it was resolved, that the act did not avoid the lease, if the accustomed yearly rent or more were reserved; and that, forasmuch as the said heriot was not an annual thing, nor a thing depending on the rent, it was sufficient if the yearly rent were reserved (*h*). So, where in addition to the usual yearly rent, the running of a colt was reserved by the former leases, it was determined that a new lease was good although the running of the colt was omitted to be reserved (*i*); because, *quoad* this, it was neither a reservation, nor an exception (*k*).

More than the accustomable yearly ferm or rent is expressly authorized by the statute to be reserved. And, therefore, if two manors have been usually let for 60*l.* a-year, a lease of one of them only, reserving thereon the whole rent is good (*l*).

Whether a part of lands accustomably letten together could be separately demised at a *pro rata* rent was formerly a disputable point. The difficulty, as far as spiritual persons are concerned, was removed by the statute 39 & 40 Geo. 3. (*m*), which declared (*n*), that apportioned rents reserved on leases granted and to be granted of parts of the ecclesiastical lands, &c., should be deemed the ancient and accustomed rents for such parts, provided (*o*) that, in case the whole land, &c., should be demised in parts, the aggregate of the several reserved rents should not be less than the old accustomed rent on the demise of the whole; and that, in case part only of the lands, &c., should be separately demised, and the

(*h*) *Baugh v. Haynes*, Cro. Jac. 76; Mo. 759; Noy, 110. The Dean and Chapter of Worcester's case, 6 Co. 37, a. b., 3rd resolution.

(*i*) Co. Lit. 44, b. Hargr. n. (6). *Ensden v. Denny*, Palm. 104.

(*k*) Hargr. n. (6) to Co. Lit. 44, b.

(*l*) 5 Co. 6, a. *Threadneedle v. Lynham*, Līnc, Lynum, or Linum, 1 Mod. 203; S. C. 2 Mod. 57; Pollexf. 176; 1 Freem. 92. 119. 165. 179; 3 Keb. 192. 372. 583. 595. *Dyke v.*

The Bishop of Bath and Wells, 1 Bro. P. C. 502; Toml. ed. vol. 6, p. 365; Jour. vol. 20, p. 58.

(*m*) 39 & 40 Geo. 3. c. 41. By a private act of parliament, 35 Geo. 3. c. 109, the Bishop of Ely was empowered to grant out estates belonging to his See in several smaller parcels. Co. Lit. by Thomas, vol. 2, p. 423, n. (3).

(*n*) Sect. 1.

(*o*) Sect. 3.

remainder retained in possession, the rent or rents reserved by such separate lease or leases should not be less in proportion to the fine or fines to be received on granting such lease or leases, than the rent or rents accustomed to be reserved for the whole of the said premises was in proportion to the fine received on granting the last entire lease; but that statute being applicable to ecclesiastical persons only tends rather to aggravate than diminish the doubt as to the power of tenant in tail, and husband and wife seised in right of the wife, to make such lease. The better opinion, notwithstanding the fifth resolution in Lord Mountjoy's case (*p*) would lead to a different conclusion, appears to be favorable to the power (*q*).

The statute of 39 & 40 Geo. 3. confers no power even on spiritual persons to comprise in one lease, at one entire rent, several farms which have been usually let distinctly, and at distinct rents, although the entire rent may equal or exceed the aggregate of the several rents formerly reserved. According to Lord Mountjoy's case (*r*), such a lease by tenant in tail would be invalid.

If two coparceners tenants in tail of twenty acres, every acre of equal value, and accustomably letten, make partition, each may lease her distinct moiety, reserving the half of the accustomable rent (*s*).

It is not necessary that the rent be reserved by express words of reservation, if it be made payable by words tantamount to a reservation. Accordingly, where a lease was made by the Petty Canons of St. Paul's of lands, of which the ancient rent was 40*l.* and a couple of capons, reserving 40*l.* a-year, and the lessee covenanted to pay, over and above, a couple of capons yearly, the Court refused to disturb it (*t*); but a lease made to a man and his wife, with such a render

(*p*) Mountjoy's case, 5 Co. 5, b., 5th resolution. And see Owen v. App Rees, Cro. Car. 94.

(*q*) Co. Lit. 44, b. Doe dem. Earl of Shrewsbury v. Wilson, 5 Barn. & Ald. 363, 385, 5th point.

(*r*) Mountjoy's case, 5 Co. 5, b., 5th resolution. And see 1 Co. 139, a.

Smith v. Trinder, Cro. Car. 22-3. Orby v. Lord Mohun, 3 Ch. Rep. 75; S. C. 2 Vern. 531, 542; Freem. 291; Gilb. Eq. Rep. 45; Pree. Ch. 257; 1 Eq. Ca. Ab. 343, pl. 5.

(*s*) Co. Lit. 44, b. Mountjoy's case, sup., 5th resolution.

(*t*) Morrice v. Antrobus, Hardr. 325.

and covenant, would not bind the successor; because the husband's covenant, from its being inoperative against the wife, did not amount to a reservation (*u*).

Nor does any necessity appear to exist for reserving the rent payable on the identical days on which it has been accustomedly paid; for, if it be reserved yearly, whether it be made payable yearly at one time, or half yearly, the words of the act will be satisfied, although the tenants may have formerly made their payments quarterly (*x*). So, it is sufficient if the ancient rent be made payable on four days, or within twenty days after; as the successor, whose advantage in this respect was the object of the statute (*y*), would be benefited by the death of the lessor after the four days, and within the twenty (*z*).

A variation of the reservation in words only, as of eight bushels, instead of a quarter, of wheat, will not invalidate the lease; because both the old and new reservations are the same in quality, value, and nature (*a*); but a reservation of silver in lieu of gold, it appears, would produce that effect (*b*). Prudence, therefore, demands in almost all cases a strict adherence as well to the usual form as to the substance of the reservation, lest a departure from the established mode should lead to controversy, or, perhaps, prove fatal to the lease.

It should seem that the rent first reserved immediately after the passing of the act must be deemed the ancient rent, unless the amount has been increased, after which the rent cannot again be reduced to its former standard (*c*).

(*u*) *Morrice v. Antrobus*, Hardr. 325.

(*x*) *Dean and Chapter of Worcester's* case, 6 Co. 37. 38., 4th resolution. *Baugh v. Haynes*, Cro. Jac. 76. *Cook v. Younger*, Cro. Car. 17. And see *Doe dem. Douglas v. Lock*, 2 Adol. & Ell. 705. 737; S. C. 4 Nev. & Man. 807. *Fryer v. Coombs*, 11 Adol. & Ell. 403.

(*y*) *Baugh v. Haynes*, sup.

(*z*) *Bayly v. Munday*, 2 Lev. 61; S. C., nom. *Bayly v. Murin*, 1 Vent.

244; 3 Keb. 46. 107. 193. The late apportionment act of 4 W. 4. c. 22, does not seem to apply to this case.

(*a*) *Mountjoy's case*, 5 Co. 5, b., 5th resolution.

(*b*) *Ibid.* 2 Vern. 544. *Gilb. Eq. Rep.* 60.

(*c*) *Orby v. Lord Mohun*, 2 Vern. 543; S. C. *Gilb. Eq. Rep.* 45; *Prec. Ch.* 257; 1 *Eq. Ca. Ab.* 343. pl. 5; *Freem.* 291; 3 *Rep. in Ch.* 102. *Morrice v. Antrobus*, Hardr. 325.

Care must be taken in every lease made subsequently to the redemption of the land tax, by any bishop or other ecclesiastical corporation, in pursuance of the power for that purpose contained in the land tax redemption act (*d*), to reserve not only the ancient and accustomed yearly rent, but also the annual amount of the land tax redeemed; it having been determined (*e*) that an omission to do so will render the lease voidable at the option of the successor.

With regard to leases existing at the time of the redemption, the statute enacts (*f*), that such land tax shall be considered as yearly rent payable to such bishop, &c., his and their successors, over and above the reserved rent, if any, and shall be recovered and paid as such.

A bishop is not bound by covenants contained in his predecessor's lease unless they have been usually inserted in former demises (*g*).

The statute of Henry the 8th, having an enabling, and not a restraining operation, did not deprive the tenant in tail of any power exercisable by him over his estate at common law; and, hence, a lease not conformable to its provisions is still effective against the lessor himself during his life; for he cannot avoid his own deed (*h*). Nor is it absolutely determined by his death, provided he leave issue inheritable to the estate tail, as to whom it is voidable only (*i*);

(*d*) 42 Geo. 3. c. 116. s. 69.

(*e*) Doc dem. Murray, Lord Bishop of Rochester, *v.* Bridges, 1 Barn. & Adol. 847. By the 88th section of the act it was declared that the land tax redeemed should in all future demises be added to the ancient and accustomed yearly rent, and be reserved and made payable and recoverable as such; and that where the lands should be demised to an under-lessee, who should be bound by any covenant or agreement to pay the land tax charged thereon, then the amount of such land tax should be considered as rent reserved or made payable on such last-mentioned demise; and that the same

powers should be had for the recovery thereof, as for the recovery of such rent when in arrear.

(*f*) Sect. 88.

(*g*) *Davenant v. The Bishop of Sarum, or Salisbury*, 2 Lev. 68; S. C. 1 Vent. 223; 3 Keb. 69.

(*h*) *Mountjoy's case*, 5 Co. 5, a., 1st resolution; S. C. Mo. 197.

(*i*) *Opee, or Opy, v. Thomasius*, 1 Sid. 261; S. C. 1 Lev. 167; T. Raym. 132; 1 Keb. 778. 910. *Machell v. Clarke*, 2 Ld. Raym. 778. 780; S. C. 2 Salk. 619; 7 Mod. 18. *Bedford's case*, 7 Co. 7, b. *Symonds v. Cudmore*, 1 Show. 370. 373; S. C. 3 Salk. 335. *Whim v. White*, 2 W. Blac. 842.

but as against remainder-men or the reversioner it is void (*k*).

If a woman tenant in tail make a lease for years not warranted by the statute, and die, leaving her husband and issue by him surviving, the issue cannot avoid it during the life of the tenant by the curtesy, although he surrender his estate to the issue (*l*).

The lease, if voidable, and not void, may be confirmed (*m*), either expressly, or impliedly, as by receipt of rent (*n*), or a distress and avowry (*o*), or any other act that can amount to a recognition of the tenancy; and if the lease be to A. for life, with remainder to B. for life, acceptance of rent from A. will enure to confirm the estate to B. (*p*). The issue cannot, by professing ignorance of his title, prevent his acceptance from operating as a confirmation, it being his duty to inform himself; and if he omit to do so, he cannot take advantage of his own neglect (*q*). But unless the party accepting the rent be entitled at the time, his acceptance will not amount to an affirmance of the lease (*r*).

The lease, if originally void as to the issue, does not admit of confirmation. Therefore, where tenant in tail, having enfeoffed another to the use of himself and his heirs, made a lease for years, and died, it was held that acceptance of the rent by the issue did not amount to a confirmation; for the issue was remitted to an estate tail by descent; and the lease, being made by the father, then tenant in fee-simple, [*i. e.*, by discontinuance,] was void as to the issue (*s*).

It is observable that equity will not interpose in favor of the lessee in a mere case of noncompliance with the provisions of the statute (*t*). But if tenant in tail, during the life

(*k*) Sup. p. 69. n. (*a*).

(*l*) Powtrel's case, Ow. 83; S. C. Dal. 65; 1 Dy. 46, b. marg.

(*m*) See the cases in note (*i*), p. 84.

(*n*) Doe dem. Southouse v. Jenkins, 5 Bing. 469; S. C. 3 Mo. & Pa. 59.

(*o*) Symonds v. Cudmore, Carth. 260.

(*p*) Jeffery v. Coyte, Cro. Eliz. 252.

(*q*) Doe dem. Southouse v. Jenkins, sup.

(*r*) 3 Salk. 3.

(*s*) Anon. Mo. 846, pl. 1143.

(*t*) Roswell's case, 1 Rol. Ab. 379. pl. 6. Earl of Darlington v. Pulteney, Cowp. 260. 267. Anon. Freem. Ch.

of his father, tenant for life, suffer the lessee of his father to expend money in repairing and improving the demised premises, the court will decree the tenant to hold undisturbed for the residue of his term (*u*).

Such are the requisites of the statute of Henry the 8th, and such is the judicial interpretation it has received.

We now proceed to show the alterations effected with regard to leases of tenant in tail by the recent act for the abolition of fines and recoveries (*x*).

The 15th section provides that "after the 31st day of December, 1833, every actual tenant in tail (*y*), whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of, for an estate (*z*) in fee-simple absolute, or for any less estate, the lands (*a*) entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in, or might be claimed by, or which, but for some previous act, would have been vested in, or might have been claimed by, the person making the disposition at the time of his making the same, and also as against all persons, including the King's most excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail, saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such

224, case, 296. *Shannon v. Bradstreet*, 1 Scho. & Lef. 52. 71. But see *Prince v. Green*, Toth. 193, numbered 225 by mistake.

(*u*) *Huning v. Ferrers*, Gilb. Eq. Rep. 35.

(*x*) 3 & 4 W. 4. c. 74.

(*y*) In the construction of the act, the expression *actual tenant in tail* means exclusively the tenant of an estate tail which shall not have been barred, and such tenant shall be deemed an actual tenant in tail, although the estate tail may have been divested or turned to a right. Sect. 1.

(*z*) The word *estate* extends to an estate in equity as well as at law,

and also to any interest, charge, lien, or incumbrance, in, upon, or affecting, lands, either at law or in equity. Sect. 1.

(*a*) The word *lands* extends to manors, advowsons, rectories, messuages, lands, tenements, tithes, rents, and hereditaments, of any tenure, (except copy of court roll,) and whether corporeal or incorporeal, and any undivided share thereof, but when accompanied by some expression including or denoting the tenure by copy of court roll, extends to manors, messuages, lands, tenements, and hereditaments, of that tenure, and any undivided share thereof. Sect. 1.

disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made."

And it was further enacted (*b*) that "every disposition of lands under this act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition if his estate were an estate at law in fee-simple absolute; provided nevertheless that no disposition by a tenant in tail shall be of any force either at law or in equity under this act unless made or evidenced by deed; and that no disposition by a tenant in tail resting only in contract, either express or implied, or otherwise, and whether supported by a valuable or meritorious consideration, or not, shall be of any force at law or in equity under this act, notwithstanding such disposition shall be made or evidenced by deed; and if the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give effect to the same; and any deed which may be executed by her for effecting the disposition shall be acknowledged by her as hereinafter directed" (*c*).

"Provided (*d*) that no assurance by which any disposition of lands shall be effected under this act by a tenant in tail thereof (except a lease for any term not exceeding twenty-one years to commence from the date of such lease, or from any time not exceeding twelve calendar months from the date of such lease, where a rent shall be thereby reserved which at the time of granting such lease shall be a rack rent, or not less than five-sixth parts of a rack rent,) shall have any operation under this act unless it be enrolled within six calendar months after the execution thereof; and if the assurance by which any disposition of lands shall be effected under this act shall be a bargain and sale, such assurance, although not enrolled within the time prescribed by the act passed in the twenty-seventh year of the reign of his Majesty

(*b*) Sect. 10.

(*c*) See sect. 79.

(*d*) Sect. 41.

King Henry the 8th, intituled 'For Enrolment of Bargains and Sales,' shall, if enrolled in the Court of Chancery within the time prescribed by this clause, be as good and valid as the same would have been if the same had been enrolled in the said court within the time prescribed by the said act of Henry the 8th."

It seems, therefore, 1, that a lease for years not exceeding twenty-one years, to commence from the date of such lease, or from any time not exceeding twelve calendar months from the date of such lease, where a rent shall be thereby reserved, which, at the time of granting such lease, shall be a rack rent, or not less than five-sixth parts of a rack rent, may be granted by a tenant in tail, without enrolment under the statute of 3 & 4 W. 4. c. 74, and without its conforming to the provisions of the act of 32 Hen. 8. c. 28 (e).

2, That leases for any other term granted by a tenant in tail will be supported against the issue in tail, reversioner, and remainder-men, if made by deed, and enrolled according to the requisitions of the fines and recoveries abolition act.

3, That no lease not authorized by that act, expressly, or impliedly, as in the case of the exception just noticed, will be binding upon the issue in tail, unless it comply with the terms of the statute of Henry the 8th. A lease for three lives, for instance, which, for want of enrolment, may fail of effect under the act of William the 4th, may be established under the former one of Henry the 8th. Leases for twenty-one years, or less, but not reserving five-sixth parts of a rack rent, may likewise be supported under the old act, though inoperative under the new one, provided the rent reserved be the accustomed rent.

If the tenant in tail making the lease be a married woman, the concurrence of her husband is necessary to give it effect, and any deed which may be executed by her for effecting the disposition must be acknowledged by her as her act and deed

(e) See also sections 25 & 26 of 3 & 4 W. 4. c. 74, which seem to recognize leases made by tenants in tail independently of the statute of Henry the 8th.

before a Judge of one of the superior courts at Westminster, or a Master in Chancery, or before two of the perpetual Commissioners, or two special Commissioners, to be respectively appointed as in the act is provided; such Judge, &c., having previously examined her, apart from her husband, touching her knowledge of such deed, and ascertained that she freely and voluntarily consents to such deed (*f*).

But the general enabling clause does not extend the powers of tenant in tail *ex provisione viri*; for it is enacted by the 16th section, “that where under any settlement made before the passing of this act any woman shall be tenant in tail of lands within the provisions of an act passed in the 11th year of the reign of his Majesty King Henry the 7th (*g*), intituled ‘Certain alienations made by the wife of the lands of her deceased husband shall be void,’ the power of disposition hereinbefore contained as to such lands shall not be exercised by her except with such assent as, if this act had not been passed, would, under the provisions of the said act of King Henry the 7th, have rendered valid a fine or common recovery levied or suffered by her of such lands (*h*).”

Tenants in tail of the gift of the Crown, and tenants in tail after possibility of issue extinct, are also excluded from the operation of the act, by the eighteenth section, which enacts, “that the power of disposition hereinbefore contained shall not extend to tenants of estates tail who, by an act passed in the 34th and 35th years of the reign of His Majesty King Henry the 8th (*i*), intituled ‘An Act to embar feigned recovery of lands wherein the King is in reversion,’ or by any other act, are restrained from barring their estates tail, or to tenants in tail after possibility of issue extinct.”

(*f*) Sections 40.79.80. The clauses of the act relative to conveyances by married women will be more fully set out in a future division, concerning leases by husband and wife.

(*g*) 11 Hen. 7. c. 20, confirmed by 32 Hen. 8. c. 36. s. 2.

(*h*) i. e., with the assent of the heirs next inheritable to the woman, or of him or them that next after the death of the same woman shall have estate of inheritance in the lands.

(*i*) 34 & 35 Hen. 8. c. 20.

And by the twentieth section it is provided, "that nothing in this act contained shall enable any person to dispose of any lands entailed in respect of any expectant interest which he may have as issue inheritable to any estate tail therein."

Previously to the late act for the limitation of actions and suits relating to real property (*k*) a common law lease for lives by tenant in tail, whether made with or without warranty, would effect a discontinuance, unless it conformed to the provisions of the statute of Henry the 8th (*l*), and consequently deprive the remainder-man of his right of entry; but it was otherwise if the statute was complied with, though the lease was accompanied with warranty (*m*). And upon this ground it appears to have been necessary in an avowry for rent under a lease made by a tenant in tail for lives, to aver, in pursuance of the statute 32 Hen. 8. c. 28, that the land had been demised, and that it was the ancient rent which had been reserved for the greater part of twenty years next before the making of the lease; nor could the neglect of averment be cured by any confession in the pleadings on the other side (*n*). So, if a lease for lives were made by a tenant in tail, (who afterwards died without issue,) and by the reversioner or remainder-man in fee, with livery, it discontinued both estate tail and remainder or reversion (*o*); but if made by tenant for life and remainder-man in tail, a discontinuance was not effected (*p*).

The practical importance, however, of the law relative to warranties by tenant in tail is now determined by a clause in the late fines and recoveries abolition act (*q*), which provided, "that all warranties of lands, which after the 31st day of December, 1833, shall be made or entered into by any

(*k*) 3 & 4 W. 4. c. 27.

(*l*) *Baker v. Hucking, or Hacking*, Hutt. 126; S. C. Cro. Car. 337. 405; W. Jo. 353. Co. Lit. 333, a.

(*m*) *Keen v. Cope*, Cro. Eliz. 602; cited *Vaugh. 333. Reeve v. Cox*,

Noy, 66.

(*n*) *Mallet v. Mallet*, Cro. Eliz. 707.

(*o*) *Baker v. Hucking, or Hacking*, sup.

(*p*) *Trevilian v. Lane*, Cro. Eliz. 56.

(*q*) 3 & 4 W. 4. c. 74. s. 14.

tenant in tail thereof, shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeazance of the estate tail."

And the same remark applies to the law of discontinuance, the distinction between real and possessory actions for the recovery of land having been almost wholly exploded by the late act for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto (*r*), the thirty-sixth section of which enacted, "that no action real or mixed (except a writ of right of dower, or writ of dower unde nihil habet, or a quare impedit, or an ejectment,) and no plaint in the nature of any such writ or action, (except a plaint for freebench or dower,) shall be brought after the thirty-first day of December, 1834; though it was provided (*s*), that when, on the first of June, 1835, any person whose right of entry to any land should have been taken away by any descent cast, discontinuance, or warranty, might maintain any such writ or action in respect of such land, such writ or action might be brought after the said first day of June, 1835, but only within the period during which, by virtue of the provisions of the act, an entry might have been made upon the same land by the person bringing such writ or action if his right of entry had not been so taken away.

And it was further enacted (*t*) that no descent cast, discontinuance, or warranty, which might happen or be made after the thirty-first day of December, 1833, should toll or defeat any right of entry or action for the recovery of land.

Under the old law, a fine levied, or recovery suffered, by a tenant in tail had the effect of confirming a voidable lease granted by him (*u*); and a clause productive of the like

(*r*) 3 & 4 W. 4. c. 27.

(*s*) Sect. 33.

(*t*) Sect. 39.

(*u*) *Stapilton v. Stapilton*, 1 Atk. 9.
Beck dem, *Hawkins v. Welsh*, 1 Wils.

276. And see 1 Co. 62, a. 2 Co. 52, b.
Godfrey Wade alias Machwilliam's
case, Winch, 41. Anon. Freem. Ch.
310.

effect is contained in the fines and recoveries abolition act, where it is provided (*x*), “that when a tenant in tail of lands under a settlement shall have already created, or shall hereafter create, in such lands, or any of them, a voidable estate in favor of a purchaser for valuable consideration, and shall afterwards under this act, by any assurance, other than a lease not requiring enrolment, make a disposition of the lands in which such voidable estate shall be created, or any of them, such disposition, whatever its object may be, and whatever may be the extent of the estate intended to be thereby created, shall, if made by the tenant in tail with the consent of the protector (if any) of the settlement, or by the tenant in tail alone if there shall be no such protector, have the effect of confirming such voidable estate in the lands thereby disposed of, to its full extent as against all persons, except those whose rights are saved by this act; but if, at the time of making the disposition, there shall be a protector of the settlement, and such protector shall not consent to the disposition, and the tenant in tail shall not without such consent be capable under this act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such tenant in tail would then be capable under this act of confirming the same without such consent; provided always, that if such disposition shall be made to a purchaser for valuable consideration who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him.”

Formerly, if tenant in tail with an immediate reversion or remainder in fee to himself made a lease to commence after the determination of an existing lease, and died before the commencement, and his issue in tail levied a fine to the use of himself in fee, whereby the base fee acquired by the fine

(*x*) 3 & 4 W. 4. c. 74. s. 33. And voidable estates where the tenant in
see sect. 62, as to the confirmation of tail becomes bankrupt.

merged in the reversion in fee, and the issue in tail became seised in fee, as if the tenant in tail had died without issue; the reversionary lease could not be avoided, being derived out of the reversion in fee, which the lessor had at the making of the lease (*y*).

But now, by virtue of the statute (*z*), if a base fee in any lands and the remainder or reversion in fee in the same lands unite in the same person, without any intermediate estate, the base fee, instead of merging, as heretofore, becomes *ipso facto* enlarged into as large an estate as the tenant in tail, with the consent of the protector, if any, might have created by any disposition under the act, if such remainder or reversion had been vested in any other person.

It remains to add, that, by virtue of a late act of parliament (*a*), leases of the lands of infant tenants in tail, and lunatic tenants in tail, may be made by the direction of the Court of Chancery in the former case, and of the Lord Chancellor in the latter; but as the particulars of this act are fully set out in the chapters respectively treating of leases by infants (*b*), and by persons of unsound mind and their committees (*c*), it will be unnecessary to repeat them in this place.

v.—Tenant for life—Tenant by the curtesy—Tenant in tail after possibility of issue extinct—Tenant in dower—Tenant for life and Remainder-man.

As a party cannot confer on another a larger estate than he himself possesses, it follows, that a lease at will (*d*), or from year to year (*e*), or for years (*f*), granted by a tenant for

(*y*) Symonds, or Simonds, *v.* Cudmore, Holt, 666; S. C. 1 Salk. 338; 3 Salk. 335; Carth. 257; Skin. 284, 317. 328; 4 Mod. 1; 1 Show. 370; Freem. K. B. 503; 12 Mod. 32. Anon. Freem. Ch. 310.

(*z*) 3 & 4 W. 4. c. 74. s. 39.

(*a*) 11 Geo. 4. & 1 W. 4. c. 65.

sections 17 and 24.

(*b*) Ante, p. 34.

(*c*) Ante, p. 38.

(*d*) Ex parte Smyth, 1 Swanst. 355.

(*e*) Ibid. Symons *v.* Symons, 6 Madd. 207.

(*f*) Hall *v.* Arrowsmith, Poph. 105. Jenkins dem. Yate *v.* Church, Cowp.

his own life, or tenant pur autre vie, unless it be authorised by an express power (*g*), must expire on the death of the lessor in the one case (*h*), or of the cestui que vie in the other (*i*). Dealing for his own estate, he cannot be understood as meaning to affect the interest of another (*k*); and so inflexible is the rule, that a tenant pur autre vie who has granted an absolute term of years may, at law, take advantage of the death of the cestui que vie, and evict the lessee without the ordinary notice in ejectment (*l*), though he (the lessor) be also seised of the reversion by a purchase effected since the demise (*m*); nor can the lessee avail himself of the doctrine of estoppel, an interest having originally passed by the lease (*n*). On the other hand, the liability of a lessee of tenant for life ceases with the determination of the estate by the death of the lessor; nor is he estopped from showing that the estate has so determined (*o*). But if a tenant for life, seised also of the remainder in fee expectant on an intervening estate tail in the premises, make a lease, the demise, though defeated by his death as to his life estate, may ultimately take effect for the residue of the term out of his remainder in fee, by the decease of the tenant in tail without issue, and without having acquired the fee by a proper mode of assurance (*p*).

The death, however, of the tenant for life does not determine the right of his lessee to the emblements (*q*); and though the lessee be ousted by a disscisor, and the lessee of the disscisor sow the land, and then the tenant for life die,

482. Roe dem. *Jordan v. Ward*, 1 H. Blac. 97. Ludford *v. Barber*, 1 Term Rep. 95. Doe dem. *Simpson v. Butcher*, 1 Dougl. 50. Goodright dem. *Wynne v. Humphreys*, cited 1 Dougl. 52. Doe dem. *Potter v. Archer*, 1 Bos. & Pul. 531. *Bowes v. East London Waterworks Company*, 3 Madd. 375; S. C. *Jacob*, 324.

(*g*) Ex parte *Smyth*, sup. As to leases by tenants for life with power of leasing, see post, Sect. IV. of Ch. I. Pt. I.

(*h*) See the cases in note (*f*), sup.

(*i*) Co. Lit. 47, b.

(*k*) 1 Swanst. 357.

(*l*) *Ludford v. Barber*, 1 Term Rep. 95.

(*m*) Co. Lit. 47, b. Bacon on Leases, p. 127. 1 Rol. Ab. 878. pl. 8.

(*n*) Ibid. And see, as to Estoppel, ante, p. 52.

(*o*) *Brudnell v. Roberts*, 2 Wils. 143.

(*p*) *Taylor v. Stibbert*, 2 Ves. jun. 437. 442. And see 3 & 4 W. 4. c. 74. s. 40.

(*q*) Co. Lit. 55, b.

the emblements belong to his lessee; for the law preserves his right as if he had re-entered (*r*). And if a tenant for life grant a lease for years, and then surrender or forfeit his estate, the lease will remain good during his life, if the years so long continue (*s*).

The lease of tenant for life, once determined, is incapable of being continued or revived, as an interest cognisable at law, by any act of confirmation by the succeeding owner; as was particularly exemplified in the case of *Ludford v. Barber* (*t*). A tenant for life and the reversioner in fee, then an infant, were parties to a lease for years, which at the time was executed by the tenant for life only. After his decease, during the term, the reversioner, having then attained his majority, and having executed and confirmed the lease for the remainder of the term, commenced an action of covenant for nonpayment of rent; but the court, deeming the confirmation inoperative, as the lease became absolutely void on the death of the tenant for life, gave judgment in favor of the defendant. And various authorities are to the same effect (*u*).

A different rule, however, prevails in equity, if the remainder-man has encouraged an expenditure by the lessee on improvements, in confidence of his continuing tenant; or has suffered him to rebuild, and does not by his answer deny that he had notice of the lessee's proceedings. Under these circumstances, he will be prevented from controverting the lease (*x*).

And, even at law, subsequent acceptance of rent, or other acknowledgment of tenancy, may amount to a new demise by

(*r*) *Knevett v. Pool*, Cro. Eliz. 463, the first page of that number; S. C., nom. *Sir Henry Knivet's case*, 5 Co. 85, a.; *Goulds*. 143.

(*s*) *Sutton's case*, 12 Mod. 557-8.

(*t*) *Ludford v. Barber*, 1 Term. Rep. 86. *Hall v. Arrowsmith*, Poph. 105.

(*u*) *Jenkins dem. Yate v. Church*, Cowp. 482. *Doe dem. Simpson v. Butcher*, 1 Dougl. 50. *Goodright dem. Wynne v. Humphreys*, cited, 1

Dougl. 52. *Doe dem. Potter v. Archer*, 1 Bos. & Pul. 531. *Bowes v. East London Waterworks Company*, 3 Madd. 375; S. C. *Jacob*, 324.

(*x*) *Stiles v. Cowper*, 3 Atk. 692. And see *East India Company v. Vincent*, 2 Atk. 83. *Jackson v. Cator*, 5 Ves. 638. *Dann v. Spurrier*, 7 Ves. 231. 235-6. *Pilling v. Armitage*, 12 Ves. 78. 85. *Blore v. Sutton*, 3 Meriv. 237. 247. *Anon. Bunb.* 53.

the remainder-man from year to year (*y*), the lessee being a mere tenant by sufferance in the interval (*z*).

If the confirmation be made in the lifetime of the tenant for life, the lease will continue in force for the remainder of the term, and after his decease will be deemed the lease of the reversioner or remainder-man himself (*a*). But should the lease, in lieu of being made for a term of years absolute, be granted for years determinable on the decease of the tenant for life, the act of confirmation will be nugatory, as the term must necessarily determine with the period originally marked out for its continuance (*b*).

It is said, indeed (*c*), that if a man make a lease to another for twenty-one years if the lessee shall so long live, and the lessor and lessee join in a grant by deed of the term to another, and afterwards the lessee die within the term, the grantee shall enjoy the land during the residue of the term absolutely. But to reconcile this, says Bacon (*d*), with the preceding case, it must be intended that in the assignment no notice is taken of the express limitation affixed to the lease; but that they joined in an assignment of the lease for the residue of the twenty-one years, and then it may well be construed to amount to a confirmation by the lessor for that time, as the lessor may confirm the land to the lessee for any longer time, and thereby enlarge his estate or interest.

There is no objection to the lease of a tenant *pur autre vie* being made to commence after his death (*e*).

If a party take possession of a house under an agreement for a long term, and, after having laid out considerable

(*y*) Doc dem. *Martin v. Watts*, 2 Term Rep. 83; S. C. 2 Esp. 501. Roe dem. *Jordan v. Ward*, 1 H. Blac. 97. Roe dem. *Brune v. Prideaux*, 10 East, 187-8. Doc dem. *Collins v. Weller*, 7 Term Rep. 478. Doc dem. *Tucker v. Morse*, 1 Barn. & Adol. 365.

(*z*) Ibid. *Preston v. Love, Noy*, 120. Roe dem. *Jordan v. Ward*, 1 H. Blac. 99.

(*a*) *Hall v. Arrowsmith*, Poph. 105. *Mayowe's case*, 1 Co. 147, b.; S. C., nom. *Kettle v. Mason*, Poph. 50; Lane, 38. Lit. s. 529. Co. Lit. 301, a.

(*b*) Ibid.

(*c*) In *Lampet's case*, 10 Co. 49, a.

(*d*) 3 Bac. Ab. 398. Bacon on Leases, p. 127.

(*e*) *Utty Dale's case*, Cro. Eliz. 182.

sums in repairs and improvements, discover that the lessor was tenant for life only, it seems that he has no lien on the estate for the expenditure (*f*).

Tenants by the curtesy (*g*), and tenants in dower (*h*), though their estates are *quodam modo* a continuance of the estate of their wives, or husbands, are, for the purposes of leasing, considered simply as tenants for their own lives; and, consequently, their demises determine on their deaths, without the possibility of being confirmed at law by the succeeding owner of the reversion (*i*). Their lessees holding over, unless recognized by the succeeding owner as tenants from year to year (*j*), are merely tenants by sufferance (*k*); but they are entitled, under the circumstances before noticed (*l*), to the equity of being quieted in their possession for the remainder of their term.

Tenants in tail after possibility of issue extinct are similarly circumstanced (*m*).

If tenant in dower lease for years, and marry, her second husband's executors are entitled to the arrears of rent due at his death (*n*).

We may here notice two legislative provisions for removing the difficulty of proving the death of tenant for life, or of cestui que vic. The statute of 19 Car. 2 (*o*), after reciting that divers lords of manors and others had used to grant estates by copy of court roll, for one, two, or more life or lives, according to the custom of their several manors, and had also granted estates by lease for one or more life or lives, or else for years determinable upon one or more life or lives, and that it had often happened that such person or persons for whose life or lives such estates had been granted had gone beyond the seas, or so absented themselves for many

(*f*) Waring *v.* Mackreth, Forr. 129.

(*g*) Miller *v.* Maynewaring, W. Jo. 354; S. C., more fully reported, Cro. Car. 397.

(*h*) Bro. Ab. tit. Acceptaunce, pl. 14. Bro. Ab. tit. Lease, pl. 19.

(*i*) Miller *v.* Maynewaring, sup.

(*j*) Ante, p. 96.

(*k*) Miller *v.* Maynewaring, sup.

(*l*) Ante, p. 95.

(*m*) Bowles's case, 11 Co. 79, b. 80, a.; S. C., nom. Bowles *v.* Berrie, 1 Rol. 177. Co. Lit. 28, a.

(*n*) Anon Mo. 7. pl. 25.

(*o*) 19 Car. 2. c. 6.

years, that the lessors and reversioners could not find out whether such person or persons were alive or dead ; by reason whereof such lessors and reversioners had been held out of possession of their tenements for many years, after all the lives upon which such estates depended were dead, in regard that the lessors and reversioners, when they had brought actions for the recovery of their tenements, had been put upon it to prove the death of their tenants, when it was almost impossible for them to discover the same ; it was enacted (*p*), that if the person or persons for whose life or lives such estates had been or should be granted should remain beyond the seas, or elsewhere absent themselves in this realm, by the space of seven years together, and no sufficient proof should be made of the lives of such person or persons in any action commenced for recovery of such tenements by the lessors or reversioners, in every such case the person or persons upon whose life or lives such estate should depend should be accounted as naturally dead.

And by the fifth section it was provided, that if any person should be evicted out of any lands by virtue of the act, and afterwards if such person or persons upon whose life or lives such estate should depend should return from beyond seas, or should, on proof in any action to be brought for recovery of the same, be made appear to be living or to have been living at the time of the eviction, then the tenant who was outed, his executors, &c., might re-enter for the life or lives, or so long term as the said person or persons upon whose life or lives the said estate should depend should be living ; and should upon action to be brought against the lessors, reversioners, or tenants in possession, or other persons who since the time of the said eviction received the profits of the lands, recover for damages the full profits with interest for and from the time that he was outed and held out of the same by the said lessors, reversioners, tenants, or other persons who after the said eviction received the pro-

fits of the said lands, as well in the case when the said person or persons upon whose life or lives such estate or estates did depend were dead at the time of bringing the action, as if the said person or persons were then living.

It appears that remainder-men were included within the equity of this statute (*q*), though it extended in terms to lessors or reversioners only. But that consideration is rendered comparatively unimportant by a subsequent act, directed to a similar end, but more extensive, speedy, and efficient, in its operation, passed in the reign of Queen Anne (*r*). This act, after reciting that divers persons, as guardians and trustees for infants, and husbands in right of their wives, and other persons, having estates or interests determinable upon a life or lives, had continued to receive their rents and profits of such lands after the determination of their said particular estates or interests, and that the proof of the death of the persons on whose lives such particular estates or interests depended, was very difficult, and that several persons had been, and might be, thereby defrauded, enacted (*s*), that any person who hath, or shall have, any claim to any remainder, reversion, or expectancy, after the death of any person within age, married woman, or other person whatsoever, upon affidavit that he hath cause to believe that such minor, &c., is dead, and that the death is concealed by such guardian, &c., may once a year move the Lord Chancellor, and he is empowered to order the party concealing, or suspected to conceal, such person, to produce him to the persons and in manner therein mentioned; and that, in case of refusal or neglect, the person so concealed shall be taken to be dead; and that it shall be lawful for the person claiming any interest in the remainder, reversion, or otherwise, to enter upon the lands accordingly.

The second section provides, that if it shall appear to the court, by affidavit, that the cestui que vie is or lately was at some certain place beyond the seas, the party prosecuting the

(*q*) *Holman v. Exton*, Carth. 246.

(*r*) 6 Anne, c. 18.

(*s*) Sect. 1.

order may send over persons to view such cestui que vic; and in case of the refusal or neglect of the party concealing, or suspected of concealing, to produce the cestui que vic, in manner therein mentioned, the cestui que vic shall be taken to be dead; and that the party claiming may enter on the lands accordingly.

The third section provides, that if it shall afterwards appear upon proof that the cestui que vic was alive at the time of the order, then the party having the estate determinable on the life may re-enter, and recover the mean profits.

The fourth section provides, that if the person holding the estate determinable on life shall prove to the Court of Chancery that he has used his utmost endeavours but without effect to procure such cestui que vic to appear, and that the cestui que vic is or was living at the time of the return to the order of the court made and filed, then it should be lawful for such person to continue in possession.

And the fifth section enacts, that persons holding over after the determination of the particular estates shall be deemed trespassers, and be liable to an action for damages for mean profits accordingly.

As a court of equity will not render its assistance to a man who seeks to dis-affirm his own lease, if tenant for life make a lease of coal mines, he cannot support a bill with the remainder-man for an injunction to restrain the lessee from taking the coal, although he allege that the lease was made by mistake, and was a forfeiture of his life estate. If the remainder-man complain he must file a bill alone (*t*).

If tenant for life and remainder-man in fee concur in making a lease for years, the deed during the life of the former operates as his lease, and the confirmation of the latter; but, after the death of tenant for life, it is the lease of the remainder-man (*u*); for, says Lord Coke (*x*), seeing the

(*t*) *Wentworth v. Turner*, 3 Ves. 3.

(*u*) *Treport's case*, 6 Co. 14, b. *King v. Bery*, Poph. 57. *Baker v. Hueking*, Hutt. 126. *Nudigate's case*, Mo. 72; S. C., nom. *Newdigate v. Lord Hastings*,

2 Dy. 234, b.; S. C., Anon. Dal. 72. pl. 52. *Milliner v. Robinson*, Mo. 682. 6 East, 102-3. *Hall v. Arrowsmith*, Poph. 105.

(*x*) Co. Lit. 45, a.

lessors have several estates, the law shall construe the lease to move out of both their estates respectively, and every one to let that which he lawfully may let; and, therefore, a declaration in ejectment on a lease by a tenant for life and remainder-man must be framed with great caution: if the tenant for life be living, the plaintiff must declare on a demise by him; if not, on a demise made by the remainder-man; but in no case on the joint lease of tenant for life and remainder-man (*y*). The like remarks apply to a defendant, who cannot object to a declaration on the ground of its not alleging a joint demise (*z*).

If a husband be tenant for life, with remainder to his wife, her mere concurrence in the lease cannot operate as a confirmation (*a*); although she may pass an interest out of her remainder by pursuing the course prescribed by the fines and recoveries abolition act (*b*).

VI.—*Tenant for Term of Years.*

Persons holding terms for years may, in like manner, create subordinate interests by way of underlease; and it may not be superfluous to remind the reader in this place of a distinction already noticed (*c*) between interests of that description and assignments.

By an underlease a new and partial estate only is vested in the underlessee, a reversion being left in the lessor (*d*), the duration of which is immaterial, as it may be for a year, a month, a day, or an hour. If rent be reserved, a power of distress need not be contained in the deed, such power being

(*y*) *Milliner v. Robinson*, Mo. 682. Treport's case, sup. *King v. Bery*, sup.

(*z*) *Nudigate's case*, Mo. 72; S. C., nom. *Newdigate v. Lord Hastings*, 2 Dy. 234, b.; where Brown and Dyer considered the plea bad; *Weston and Walshe, è contra*; S. C., Anon. Dal. 72. pl. 52.

(*a*) *Friend v. Eastbrook*, 2 W. Blac. 1152.

(*b*) 3 & 4 W. 4. c. 74. s. 77, &c.; and see Sect. III. of this Chapter, as to leases by husband and wife.

(*c*) Ante, p. 9, *et seq.*, where the cases on this subject are examined.

(*d*) *Ibid.*

incident to the demise at common law (*e*). But as no privity exists between the underlessee and the original lessor, the covenants entered into between the latter and the original lessee, though they be covenants which run with the land, as to pay rent, to repair, &c., cannot affect, either by way of right or liability, the underlessee personally (*f*). The land, however, is not discharged by the underlease from the claims of the original lessor, who, notwithstanding the subdemise, may proceed to distress or eviction, if the rent be in arrear, or a forfeiture be incurred by his lessee (*g*).

An assignment, on the other hand, transfers, as we have seen (*h*), the whole interest of the lessee to the assignee; for, if the lessee retain the smallest reversionary interest, the instrument, though professing to be an assignment, will not operate otherwise than as an underlease (*i*): nor, provided the whole interest be conveyed, will the essence of the deed as an assignment be destroyed by its reserving a rent to the assignor, and a power of re-entry for nonpayment (*k*), or by its assuming, by the use of the word *demise*, or in any other respect, the character of a lease (*l*).

In the case of an assignment, the assignee is personally liable to the covenants which run with the land; and the premises still remain liable to the landlord's right of distress for arrears of rent. But this part of our subject will be more fully discussed hereafter (*m*).

If a lessee, on granting an underlease, desire to protect

(*e*) Lit. s. 213. Co. Lit. 141, b. 142, a. Curtis v. Wheeler, 1 Mood. & Malk. 493.

(*f*) Holford v. Hatch, 1 Dougl. 183. Brewer v. Hill, 2 Anstr. 413. 419. Anon. Mo. 93. pl. 230. Earl of Derby v. Taylor, 1 East, 502. Sparkes v. Smith, 2 Vern. 275; S. C. 1 Eq. Ca. Ab. 47. pl. 6. Pilkington v. Shaller, 2 Vern. 374; S. C. 1 Eq. Ca. Ab. 47. pl. 6. Doe dem. Wyatt v. Byron, 1 Man. Gra. & Sc. 623. 626.

(*g*) Arnsby v. Woodward, 6 Barn. & Cres. 519; S. C. 9 Dow. & Ry. 536.

(*h*) Ante, p. 9, *et seq.*

(*i*) Earl of Derby v. Taylor, 1 East, 502.

(*k*) Palmer v. Edwards, 1 Dougl. 187, n. [† 59]. Doe dem. Freeman v. Bateman, 2 Barn. & Ald. 168. But see Poultney v. Holmes, 1 Stra. 405; and ante, p. 9, *et seq.*

(*l*) Hicks v. Downing, or Downling, alias Smith v. Baker, 1 Ld. Raym. 99; S. C. 1 Salk. 13. Doe dem. Freeman v. Bateman, sup. Smith v. Mapleback, 1 Term Rep. 441. Parmenter v. Webber, 3 Taunt. 593; S. C. 2 J. B. Mo. 656.

(*m*) Post, Part the Sixth.

himself from the consequences of a breach by the underlessee of the covenants contained in the original lease, he must be careful to take from the underlessee covenants corresponding with those contained in that lease, or a covenant of indemnity against such breach; as an omission in this particular will prevent his recovering from the underlessee the costs incurred by him, the lessor, in defending an action for a breach brought against him by the original lessor(*n*). It is observable, however, that Lord Abinger, C.B., in the case of *Walker v. Hatton* (*o*), said, that he was by no means clear that, even if there had been a covenant to indemnify, the costs would have been recoverable, as that would only extend to costs necessarily incurred.

The underlessee sometimes stipulates for a clause to protect him from paying his rent till production by his lessor of the superior landlord's receipt for the chief rent, with a provision that if the chief rent be not paid within a specified time after it shall become due, the underlessee may pay it, and that the superior landlord's receipt shall be a good discharge (*p*).

VII.—*Tenant from Year to Year.*

A tenant from year to year cannot confer by way of underlease an interest exceeding his own in point of duration. A demise by him to another, also to hold from year to year, is, in legal operation, a demise from year to year during the continuance of the original tenancy of the intermediate landlord(*q*), and is properly so described in pleading, although at the time of making the contract no such qualification is mentioned (*r*). But it seems that the interest of

(*n*) *Penley v. Watts*, 7 Mees. & Wel. 601. *Walker v. Hatton*, 10 Mees. & Wel. 249, wherein Neale *v.* Wyllie, 3 Barn. & Cres. 533, was declared not to be law.

(*o*) *Walker v. Hatton*, sup.

(*p*) *Roe dem. Gregson v. Harrison*,

2 Term Rep. 425.

(*q*) *Pike v. Eyre*, 9 Barn. & Cres. 909; S. C. 4 Man. & Ry. 661. *Browne v. Warner*, 14 Ves. 412. *Oxley v. James*, 13 Mees. & Wel. 209, 212.

(*r*) *Pike v. Eyre*, sup. *Oxley v. James*, sup.

the underlessee cannot be defeated by the mesne lessee's surrendering his estate in the premises to the lessor (*s*): nor can the underlessee's interest be determined by the original lessor's giving him a notice to quit: the notice should be given either by such lessor to his lessee; or by the mesne lessee to the underlessee (*t*).

It is clear that a tenant from year to year underletting from year to year, acquires such a reversion as will entitle him to distrain for rent in arrear (*u*). And if a tenant from year to year grant a lease for twenty-one years, his executor may maintain an action of covenant upon it against the underlessee, though the breach be committed after the mesne lessor's death (*v*).

VIII.—*Tenant at Will.*

A tenant at will, from the peculiar nature of his estate, is disqualified from granting a lease available against any one but himself (*x*); for the demise would amount to a determination of the will (*y*).

The operation, however, of such a lease upon the estate of the original lessor, being the owner of the freehold, has been the subject of some contrariety of opinion. In the Year Book, 12 E. 4 (*z*), it is laid down, and confirmed by subsequent authorities (*a*), that the lease would cause a present disseisin, unless it were made to commence *in futuro* (*b*). But Dyer and Manwood, in opposition to the opinion of Harper, agreed that a lease by tenant at will would not

(*s*) Pleasant dem. Hayton v. Benson, 14 East, 234. Co. Lit. 338, b. And see Doe dem. Beadon v. Pyke, 5 Mau. & Selw. 146.

(*t*) Ibid.

(*u*) Curtis v. Wheeler, 1 Mood. & Malk. 493. Oxley v. Janes, 13 Mees. & Wel. 209, 212.

(*v*) Mackay v. Mackreth, 2 Clit. 461.

(*x*) Moss v. Gallimore, 1 Dougl. 283.

Spark's case, Cro. Eliz. 676.

(*y*) Ibid. Shaw v. Barbor, Cro. Eliz. 830. Birch v. Wright, 1 Term Rep. 382. 2 Wils. 132. Hardr. 47.

(*z*) 12 E. 4, 12, pl. 5.

(*a*) Anon. Dal. 46, pl. 1. Shaw v. Barbor, sup. Spark's case, sup. Cooper v. Columbell, Noy, 56.

(*b*) Cooper v. Columbell, sup.

operate as a disseisin, but was void; and they denied 12 E. 4. 12 to be law (*c*).

These decisions are scarcely to be reconciled; but, in all probability, the entry of the lessee of tenant at will would, in accordance with cases (*d*) of later occurrence than those before cited, be determined, at the present day, to operate by way of disseisin, or not, at the election of the freeholder. And should he refuse to treat the lease and entry as a disseisin, the lessee, it is apprehended, would stand in the relation of a new tenant at will, until converted into a tenant from year to year by acceptance of rent or other acknowledgment of a yearly tenancy.

As copyholders are, even at this day, but tenants at will, though according to the custom of the manor, their leasing capacity may be noticed in the next division.

IX.—*Copyholders.*

A copyholder, whatever quantity of interest he may have, is restrained by the peculiar nature of his tenure from demising his copyhold for more than a year, unless authorised by the custom of the manor (*e*), or the express license of the lord (*f*). And of this poor privilege of leasing even for a year, which is allowed by the general custom of the kingdom (*g*), it is said (*h*), he may be deprived by a particular custom to the contrary.

(*c*) The authority for this assertion has unfortunately been mislaid.

(*d*) *Blunden v. Baugh*, Cro. Car. 302; S. C. W. Jo. 315. *Gerrard v. Norris*, Latch, 53. *Fisher's case*, Latch, 75. *Powseley*, or *Pouseley*, *v. Blackman*, or *Blakeman*, Cro. Jac. 659; S. C. Palm. 201; 2 Rol. 284; S. C., nom. *Ponesley v. Blackman*, J. Bridgm. 12. 3 Mod. 196. Lit. s. 583.

(*e*) *Wells v. Partridge*, Cro. Eliz. 469. 6 Vin. Ab. 118. *Wilcock's case*, 2 Danv. Ab. 195. pl. 9. 1 Rol. Ab. 508, l. 5. *Jackman v. Hoddesdon*, Cro. Eliz.

351. *Kensey v. Richardson*, Cro. Eliz. 728. *Cramporn v. Freshwater*, Brownl. 133.

(*f*) *Kensey v. Richardson*, sup. *Jackman v. Hoddesdon*, sup.

(*g*) *Mathewes v. Weston*, W. Jo. 249; S. C., nom. *Mathews v. Whetton*, Cro. Car. 233. *Lenthall v. Thomas*, 2 Keb. 267. *Melwich v. Luter*, or *Luther*, 4 Co. 26, a.; S. C. Cro. Eliz. 102. *Frosl v. Welch*, Cro. Jac. 403. *Combes's case*, 9 Co. 75, b.

(*h*) 1 Prest. Abst. 202.

In some manors, the custom authorises a lease for three years without license (*i*) ; in others, a lease for life and forty years over (*k*) ; or from three years to three years to the term of twenty-one years (*l*). In the manor of Highbury, in the County of Middlesex, it appears that the custom warrants the granting of a lease for any term not exceeding twenty-one years (*m*). And in the manors of Stepney and Hackney, in Middlesex, there is a custom that the copyholders may grant leases without license from the lord for any term not exceeding thirty-one years and four months, in possession, so that such leases be presented to the homage, and entered on the rolls, at the first or second general court met after the making thereof (*n*).

A custom also that, on payment of ten years' rent, the lord shall license to let for ninety-nine years, and that on his refusal the tenant may lease without license, has been adjudged good (*o*).

But a custom that a copyholder for life shall lease for the life of another cannot be maintained (*p*).

A lease for a longer term than is authorised by the custom or by license occasions a ground of forfeiture of the copyholder's estate (*q*), which the lord may enforce or waive at his option (*r*). The rule is the same whether the lease be by indenture or parol (*s*), or made to commence *in futuro* (*t*), and even though the lessee neglect to enter (*u*), or die before entry (*x*). But the lessee has a title against every one but the lord (*y*) ; and, therefore, if a copyholder lease the copyhold

(*i*) Wells *v.* Partridg, *sup.* Wilcock's case, *sup.*

(*k*) Anon. Mo. 8. pl. 27.

(*l*) Scriv. Cop. 544, 3rd ed.

(*m*) Rawstorne *v.* Bentley, 4 Bro. C. C. 415.

(*n*) Scriv. Cop. 544, 3rd ed.

(*o*) Grove *v.* Bridges, cited in Porphyry *v.* Legingham, 2 Keb. 344.

(*p*) Anon. Godb. 171, case 236. Anon. Mo. 8. pl. 27. Com. Dig. Copyhold, (K. 3.).

(*q*) Anon. Mo. 184. pl. 329. 3 Atk. 141.

(*r*) Doe dem. Robinson *v.* Bousfield, 1 Carr. & Kir. 558 ; S. C. 6 Q. B. 492.

(*s*) Jackman *v.* Hoddesdon, Cro. Eliz. 351. East *v.* Harding, Cro. Eliz. 498 ; S. C. Mo. 392.

(*t*) Ibid. Harding *v.* Turpin, Hetl. 122.

(*u*) Anon. Mo. 184. pl. 329.

(*x*) East *v.* Harding, *sup.*

(*y*) Doe dem. Tresidder *v.* Tresidder, 1 Q. B. 416 ; S. C. 1 Ga. & Dav. 70. Doe dem. Robinson *v.* Bousfield, 1 Carr. & Kir. 558 ; S. C. 6 Q. B. 492.

for a term of years exceeding the period allowed by the custom, a prior tenant from year to year holding over after due notice from the lessee to quit, cannot resist an ejectment on the ground of the lessee's want of title from the invalidity of the lease (*z*).

So, under a custom authorising a lease for twenty-one years, the copyholder cannot make a lease for that term to commence from a day to come (*a*).

In the case of a feme copyholder, however, a forfeiture occasioned by her husband's unauthorised lease will not affect her after his decease (*b*). And so, if an infant copyholder make a lease not warranted by license or custom, a forfeiture may be avoided by his refusal to confirm it on attaining his majority (*c*).

No one but the lord at the time the forfeiture accrues can take advantage of it: if he die before entry or seizure, his right does not devolve on the remainder-man or reversioner (*d*).

The license, being only an authority, cannot extend beyond the interest in the manor of the lord who grants it (*e*); and, therefore, a lease granted under a license will cease on the lord's death, if he be only tenant for life; or on the determination of his term, if he be tenant for years (*f*); but, as the demise is effected under the authority of the lord for the time being, the remainder-man or reversioner of the manor cannot enter on the copyhold for a forfeiture (*g*). It is apprehended that the law is the same though the lord granting the license be merely tenant at will, as he may dispense with a forfeiture, not only as to himself, but as to

(*z*) Doe dem. Robinson *v.* Bousfield, sup.

(*a*) O. Bridgm. by Bann. 97.

(*b*) Saverne *v.* Smith, Palm. 383; S. C. Cro. Car. 7; Bendl. 131. 147, the second page of that number. 2 Rol. 344. 361. Hedd *v.* Chalener, Cro. Eliz. 149.

(*c*) Ashfield *v.* Ashfield, W. Jo. 157; S. C. Latch, 199; Godb. 364; Noy, 92.

(*d*) Lady Montague's case, Cro. Jac. 301; S. C., nom. Hamlen *v.* Hamlen, 1 Bulstr. 189. Eastcourt *v.* Weeks, 1 Salk. 186-7.

(*e*) Petty *v.* Evans, 2 Brownl. 40. 1 Rol. Ab. 511, Copihold, (K). pl. 2. Munifas *v.* Baker, 1 Keb. 25.

(*f*) Ibid.

(*g*) Milfax *v.* Baker, 1 Lev. 26; S. C., nom. Munifas *v.* Baker, 1 Keb. 25.

the reversioner or remainder-man also (*h*) ; but a lord by tort or disseisin has not the same power (*i*).

The circumstance of the license not extending beyond the lord's interest in the seignior, observes Mr. Serjeant Scriven (*k*), renders it expedient that, in all settlements of manors of which copyholds are holden, but more particularly when the property has been usually let on long leases, or is likely to become improveable by buildings or otherwise, a power should be inserted authorising the person in possession of the manor for the time being, (however limited his interest,) to grant licenses to demise for such period of time, and under such restrictions, as circumstances may seem to require ; taking the usual fines, and conforming in all respects to the custom of the manor.

A steward cannot, *virtute officii*, grant a license to demise, though in full court, and in the name of the lord, unless there be express words in his patent to enable him to do so, or special authority be given him by the lord, or by some particular custom ; this doctrine is supported by Sir Edward Coke (*l*), and C. B. Gilbert (*m*), but is denied by Kitchen (*n*).

No instance is to be found of a mandamus to the lord of a manor to grant a copyholder a license to demise (*o*). It is said to have been decided that he may be compelled to do so in equity (*p*) ; but the authority cited is by no means satisfactory (*q*). In the case last quoted, facts were stated to show that the tenant had a right to demise for any term not exceeding three years, without license, and that, for a longer term, the lord for every license to demise was entitled to 4*d.* for every year of the term ; but the Court refused an application for a mandamus. If, however, the lord, for a valuable consideration, agree with his copyholder to grant a

(*h*) Milfax, or Munifas, v. Baker, sup.

(*i*) Ibid.

(*k*) Scriv. Cop. 546, 3rd ed.

(*l*) Co. Cop. s. 44. Co. Law Tr. by Serjt. Hawkins, p. 101-2.

(*m*) Gilb. Ten. 333, and 5th ed. by

Watk. p. 433.

(*n*) Kitch. 35, a.

(*o*) Regina v. Hale, 9 Adol. & Ell. 339; S. C. 1 Per. & Dav. 293.

(*p*) Ballard v. Agard, 6 Vin. Ab. 240, Copyhold, (Y. c.).

(*q*) Regina v. Hale, sup.

license, a court of equity will decree him to grant it accordingly (*r*).

A memorandum of the grant of a license is usually entered on the Court rolls.

Generally speaking, the lord's license must be strictly pursued. And, accordingly, it is held, that a copyholder, under a license to demise for twenty-one years from a time past, cannot make a lease to commence at a future day (*s*); or, if a condition precedent be annexed to the license, an efficient grant cannot be made until the condition be performed (*t*). A condition subsequent has a different operation (*u*).

But the copyholder is not bound to grant for the exact term specified in the license. Though he cannot demise for a longer, he may for a shorter period; for instance, a license to demise for twenty-one years authorises a lease for any less interest (*v*). So, where a copyholder for life is licensed to make a lease for twenty-one years, if he the copyholder should so long live, he may demise for the twenty-one years, or a shorter term, absolutely; for the restriction is no more than what the law implies, the lease without any such limitation being determined by the lessor's death. It is otherwise, when the license prescribes that the lease shall be limited to five years, if a stranger shall so long live (*x*); or if the copyholder be seised in fee; for then the license must be strictly pursued, lest the heir should be prejudiced by the continuance of the lease after his ancestor's death (*y*).

If the license has been once exercised and exhausted, a new demise cannot be made without a new license: and, therefore, it seems, that if a copyholder, having a license to lease for twenty-one years from Michaelmas then next, make

(*r*) *Hungerford v. Austen*, Nels. 49.

(*s*) *Jackson v. Neal*, Cro. Eliz. 395.

And see *O. Bridgm. by Bann.* 97.

(*t*) *Hall v. Arrowsmith*, Poph. 106;

S. C., nom. *Haddon v. Arrowsmith*,
Cro. Eliz. 461; *S. C. Ow.* 72.

(*u*) *Ibid.*

(*v*) *Goodwin v. Longhurst*, Cro. Eliz.

535. *Worledge v. Benbury*, Cro. Jac.
436.

(*x*) *Worledge v. Benbury*, sup. O.
Bridgm. by Bann. 205. *Haddon v.*
Arrowsmith, or *Hall v. Arrowsmith*,
sup.

(*y*) *Ibid.*

a lease accordingly, and before Michaelmas make another lease of the same lands for twenty-one years to commence at Michaelmas then next, the second lease, though void in interest, but good by estoppel, will work a forfeiture, the license being satisfied by the first (*z*). This was the opinion of Anderson, C.J.; but C. B. Gilbert questions its propriety; "for," says he (*a*), "the lease was void in point of interest, and only worked by way of estoppel between the parties; and if no interest passed, how could it be a forfeiture? Yet had the first lease been surrendered, the second lease would have taken effect, and then the land had been charged with a lease without license; but till that happened, the land was charged with nothing in point of interest: and this is not like the case of a future lease; for there the land is bound presently; and though this may happen to be a charge, yet the supposition is foreign, and ought not to be intended to work a forfeiture."

Though the lease be voidable by the lord of the manor, the lessor cannot take advantage of its not being warranted by license (*b*).

A license is not necessary to an underlease or an assignment by the lessee (*c*).

By custom, a license to demise, though not in terms extending to the copyholder's assigns, may run with the land, and be exercised by his surrenderee (*d*).

By the late act (*e*) for enabling ecclesiastical corporations aggregate and sole to grant leases for long terms of years, each lease granted under its provisions by any corporation, either aggregate or sole, of any lands or houses, mines, minerals, quarries, or beds, of copyhold or customary tenure, or of any watercourses, ways, or easements, in, upon, over,

(*z*) Anon. Mo. 184. pl. 329.

(*a*) Gilb. Ten. 219. 220.

(*b*) Downingham's case, Ow. 17. 18. Ashfield v. Ashfield, W. Jo. 157; S. C. Latch, 199; Noy, 92; Godb. 364. Doe dem. Tresidder v. Tresidder, 1 Q. B. 416; S. C. 1 Ga. & Dav. 70.

(*c*) Johnson v. Smart, 1 Rol. Ab.

508. pl. 14.

(*d*) Whitton v. Peacock, 3 Myl. & K. 325. 335.

(*e*) 5 & 6 Vict. c. 103. See further, as to the provisions of this act, Sect. IV. of this Chapter, relating to leases by Ecclesiastical corporations.

or under, any such lands, where the copyhold or customary tenant thereof is not authorised to grant or make leases or grants for the term of years intended to be created by such lease without the license of the lord of the manor, must be made with the consent of the ecclesiastical commissioners for England, and also of the lord for the time being of the manor of which the same lands, &c., shall be holden ; and such consent shall amount to a valid license to lease the same lands, &c., for the time for which the same shall be expressed to be demised by such lease (*f*). The consent is to be testified by such person being made a party to such deed, and duly executing the same (*g*).

And where the consent of the lord for the time being of any manor is required, and he or she shall be a minor, idiot, lunatic, or feme covert, or beyond seas, the guardian, committee, husband, or attorney, as the case may be, of such lord, but in case of a feme covert not being a minor, idiot, or lunatic, or beyond the seas, with her consent in writing, may execute the instrument by which such consent is to be testified, in testimony of the consent of such lord ; and such execution is, for the purposes of the act, directed to be deemed and taken to be an execution by the lord of the manor (*h*).

We find in the books, that a copyholder's demise confers a common law interest, capable of supporting an action of ejectment (*i*). It is certain that the lessee need not be admitted, as he does not become tenant to the lord (*k*). But upon what principle the copyholder can transfer a portion of the interest

(*f*) Sect. 20.

(*g*) Sect. 21.

(*h*) Sect. 24.

(*i*) *Melwich v. Luter*, or *Luther*, 4 Co. 26, a. *Cole v. Wall*, Cro. Eliz. 224 ; S. C. 2 Bulstr. 328. *Jackson v. Neal*, Cro. Eliz. 394. *Wells v. Partridge*, Cro. Eliz. 469, the first page of that number. *Goodwin v. Longhurst*, Cro. Eliz. 535. *Collins v. Harding*, Cro. Eliz. 623. *Spark's case*, Cro. Eliz. 676 ;

S. C., nom. *Sprake's case*, Mo. 569. *Kensey v. Richardson*, Cro. Eliz. 728. *Turner v. Hodges*, Hetl. 126 ; S. C. Lit. 233 ; Hutt. 101. *Erish v. Rives*, Cro. Eliz. 717. *Downingham's case*, Ow. 17. 18. *Doe dem. Tresidder v. Tresidder*, 1 Q. B. 416 ; S. C. 1 Ga. & Dav. 70. But see *Anon. Poph. 188*, and *Ever v. Aston*, Mo. 271.

(*k*) *Watk. Cop.* 3rd ed. by *Vidal*, vol. 1, p. 368. 466.

which is generally admitted to reside in the lord, is not very clear. They who endeavour to explain it by alleging that the demise is valid against all persons but the lord (*l*), advance an argument which appears to disprove rather than prove their position; for, by admitting the continuing legal interest in the lord, they in effect deny the copyholder's power of passing a portion of it to another. The current of authority, however, in support of the right of a copyholder's lessee to maintain an ejectment at common law is too strong to be resisted.

In the case of a license, the lease, perhaps, in strictness, occasions a forfeiture, though the lord cannot seize or enter, being precluded by his license, which operates as a confirmation of the lease (*m*), or a dispensation with the forfeiture. And, hence, if a copyholder make a lease for years with license, and die without heirs (*n*), or forfeit his copyhold (*o*), the lord cannot disturb the possession of the lessee.

The custom, or license, ought to be specially shown in the declaration, in an action of ejectment brought by the lessee of a copyholder (*p*).

It is amusing to trace the ingenious devices resorted to at various periods for evading the required license, and for preserving at the same time the copyholder's estate from forfeiture. In one case (*q*), a copyholder made a lease for a year, excepting the last day, and so from year to year, excepting the last day of every year, as long as he lived; but he paid the penalty of his artifice by the forfeiture of his copyhold; it being held, without argument, that it was a certain lease for two years, with the exception of two days, and, therefore, in effect a lease for more than one year. Williams, J., quaintly said (*r*),

(*l*) Hall *v.* Arrowsmith, Cro. Eliz. 461-2. Goodwin *v.* Longhurst, Cro. Eliz. 535. Spark's case, Cro. Eliz. 676. Ashfield *v.* Ashfield, W. Jo. 157; S. C. Godb. 364. Downingham's case, sup. Doe dem. Tresidder *v.* Tresidder, sup.

(*m*) Anon. Poph. 188.

(*n*) Turner *v.* Hodges, Hutt. 101; S. C. Hetl. 126; Lit. 233. See also Anon. Poph. 188, and Johnson *v.*

Smart, 1 Rol. Ab. 518. pl. 14.

(*o*) Swinnerton *v.* Miller, Hob. 177.

(*p*) Wells *v.* Partridge, Cro. Eliz. 469. Kensey *v.* Richardson, Cro. Eliz. 728. Gregory *v.* Harrison, Mo. 679. And see Doe dem. Tresidder *v.* Tresidder, sup.

(*q*) Luttercl *v.* Weston, or Westorne, Cro. Jac. 308; S. C. 1 Bulstr. 215.

(*r*) 1 Bulstr. 215.

that the lessor had made a snare for another, and had catched himself in the same.

In another (*s*), a copyholder made, on the same day, three distinct leases for a year each, leaving an interval of two days between the termination of the one and the commencement of the next succeeding lease; but this plan was not more successful than the last: he forfeited his copyhold, the court deeming the transaction a fraudulent evasion of the law. It was further held, that the circumstance of the lord's accepting a surrender from the lessor, without notice of the lease, did not amount to a waiver (*t*).

In like manner, it has been determined, that if a copyholder empowered by the custom to lease for three years, lease for three years, and so from three years to three years, till nine years, a forfeiture is the consequence, as the lease is for six years at the least (*u*).

The reader will perceive that the forfeiture in these cases was the result of an interest being actually granted by the copyholder without license, and exceeding the period allowed by the custom of the manor. But if the excess be not actually granted, but rest merely in contract, a forfeiture will be avoided. This distinction, founded as it is on sound principle, and first propounded by the court in *Lady Montague's* case (*v*), has the sanction of later authority to give it the force of a well-established rule.

In the case alluded to (*x*), a copyholder demised his copyholds for a year only, according to the custom of the manor, and covenanted that the lessee should enjoy the lands from year to year during ten years; and it was held, that, although a lease for a year by a copyholder warranted by the custom, and so from year to year during ten years, would clearly work

(*s*) *Mathews v. Whetton*, Cro. Car. 233; S. C., nom. *Mathewes v. Whetton*, W. Jo. 249.

(*t*) *Ibid*.

(*u*) *Wilcock's case*, 2 Danv. Ab. 195. pl. 9, tit. Copyhold. 1 Rol. Ab. 508, l. 5.

(*v*) *Lady Montague's case*, Cro. Jac. 301; S. C., nom. *Hamlen v. Hamlen*, 1 Bulstr. 189. And see *Havergil v. Hare*, 3 Bulstr. 252. *Doe dem. Wood v. Morris*, 2 Taunt. 52.

(*x*) *Lady Montague's case*, sup.

a forfeiture; yet, as the grant of the copyholder in the case in question, being for a year only, with a covenant for the enjoyment for a longer time, did not amount to an actual demise beyond the year, the lord could not enter for a forfeiture.

So in *Lenthall v. Thomas* (*y*), where a copyholder let the lands in question to A. C., by articles of agreement, with promise and covenant to hold for a year, according to the custom of the manor, and so from year to year for five years, it was resolved that the lord could not enter for a forfeiture.

To the same effect is the case of *Doe dem. Coore v. Clare* (*z*). On the trial, a paper writing was produced, on an agreement stamp, under the hand and seal of T. Tidd, of whom the lessor of the plaintiff purchased, by which, after reciting that the said T. Tidd had agreed with the defendant, that, in case he should become entitled to the premises, which were copyhold, after the death of M. S., the then tenant for life, he would immediately on her decease let the same to the defendant, on the terms and conditions thereafter mentioned, it was witnessed that the said T. Tidd did thereby agree to demise and let, &c., to hold, from the decease of the said M. S., for the full term of twenty-one years; and he covenanted, on the death of M. S., and on his becoming entitled, to procure a license to let the premises; and for quiet enjoyment; and the court were of opinion that the instrument in question was an executory agreement only, and not a lease, for two reasons, first, because, if it were held to be a lease, a forfeiture would be incurred, in opposition to the intention of the parties, who, they said, had cautiously guarded against it by the insertion of a covenant that a license to lease should be procured from the lord; and, secondly, because the stamp was conformable to the nature of an agreement for a lease, and not adapted to an absolute lease (*a*).

(*y*) *Lenthall v. Thomas*, 2 Keb. 267. But see *Richards v. Ceely*, or *Sely*, 3 Keb. 633; S. C. 2 Mod. 82.

(*z*) *Doe dem. Coore v. Clare*, 2 Term Rep. 739.

(*a*) As to the stamp affecting the construction of the instrument, see post, Part the fourth, Ch. VII, relating to renewable leases.

To these succeeded the case of *Luffkin v. Nunn* (*b*). There, a copyholder in 1795 demised his copyhold to J. S., to hold for one whole year, and, at the end of the said term of one year, from year to year, for and during the term of thirteen years more (in all fourteen years), if the lord would give license and consent, and so as the same should not become forfeited or liable to be forfeited. The lease contained a covenant for quiet enjoyment during the term aforesaid; and many covenants and provisoes applicable only to a lease for several years; and it was held, that the demise conferred an interest for one year certain, and no more, as the obtaining of the lord's license (which was afterwards refused) constituted a condition precedent to the grant of a further estate. It appeared that the lord of the manor, in 1802, purchased the lessor's copyhold, and took a surrender to the use of a trustee for himself, and such trustee was allowed to recover in ejectment against the copyholder's tenant after six months' notice to quit, although he had notice of the terms of the demise when the purchase was effected, and although there was an exception in the contract of purchase of all subsisting leases, and the lord afterwards accepted quit rent from the tenant. And Lord Eldon, C., also concurring in the decision that there was no lease at law further than from year to year, decreed that there was no equity upon the circumstance of the lord's having purchased his tenant's interest with notice of the demise, and the express exception of all subsisting leases, or agreements for leases (*c*).

And, finally, the distinction has been confirmed by the decision of *Fenny dem. Eastham v. Child* (*d*), where freeholds and copyholds were demised by the same deed, to hold so much as was freehold for twenty-one years, provided the lessors so long lived, and so much as was copyhold for the term of three years under the same proviso; reddendum,

(*b*) *Luffkin v. Nunn*, 1 New Rep. 163; S. C., nom. *Doe dem. Nunn v. Luffkin*, 4 East, 221; S. C. 1 Smith, 90; 11 Ves. 170.

(*c*) 11 Ves. 170.

(*d*) *Fenny dem. Eastham v. Child*, 2 Mau. & Selw. 255. And see *Rawstone v. Bentley*, 4 Bro. C. C. 415.

during the said term of twenty-one years, the yearly rent of 31*l.* 10*s.*; and by the indenture, (after several covenants,) reciting that it was thereby agreed that, for the said yearly rent of 31*l.* 10*s.*, and under the said covenants, the defendant might hold the premises, as well copyhold as freehold, for the term of twenty-one years to commence as aforesaid as if that demise had been so made, but that the copyholds were not grantable for any longer term than three years successively, the lessors covenanted with the defendant, that they would within three months next before the expiration of the said term of three years, under the like covenants, and without any increase of rent, execute to the defendant a new lease of the said copyholds for three years, to commence after the expiration of the former term of three years, and so *toties quoties* until the term of twenty-one years was expired; and it was agreed that until such new lease should be executed, the defendant should quietly enjoy both freeholds and copyholds for the term of twenty-one years; the court again recognized the difference between an actual demise, and a covenant; and decided that the instrument in question operated, as to the copyholds, as a lease for three years only, with an executory contract for the remainder of the term; observing that it was a covenant for such a lease as might be, and not a lease for such an estate as could not be granted; and that a contrary construction would create a forfeiture of the lessor's estate, which was never contemplated by the parties.

From these cases it will be seen how anxiously the courts in construing such doubtful instruments avail themselves of slight words or circumstances to prevent a forfeiture, which, according to the authorities (*e*), is considered odious in law.

We may here notice that the previous admission of the copyholder is not essential to the validity of his demise (*f*).

Unless there be a special custom to the contrary, the husband's lease will take precedence of the widow's free-

(*e*) *Moody v. Garnon*, Mo. 343; S. C., nom. *Wood v. Germans*, Cro. Jac. S. C. 1 Rol. 330. 367; S. C., nom. 390. *Sanders v. Pope*, 12 Ves. 290. *Moodie v. Garnance*, 3 Bulstr. 153; (*f*) *Bullock v. Dibley*, Mo. 596.

bench; for he comes under the custom, and by the lord's license, as well as the feme (*g*).

By articles of agreement under hand and seal, after reciting an agreement for letting certain copyhold premises to one Price for twenty-one years from the 25th of March, 1820; that it had been agreed that the defendant should be accepted as tenant in lieu of Price; that the plaintiff was willing to let them to him as soon as a license for the purpose should be granted to him by the lord of the manor, but not before; the plaintiff, in consideration of the covenants and agreements thereafter contained on the part of the defendant, covenanted, that, when and so soon as a license should have been procured by the plaintiff from the lord of the manor, he would lease the premises to the defendant for the residue of the term of twenty-one years, to be computed from the 25th of March, 1820; and the defendant covenanted thenceforth during the residue of the said term to pay the rent, and during the term thereby agreed to be granted to pay all taxes, and from time to time *during the term to be granted as aforesaid* to repair the premises; and the plaintiff also covenanted for quiet enjoyment during the remainder of the term: the defendant entered into, and retained undisturbed possession of, the premises till the term expired by effluxion of time; but, as the lease was never granted, nor license obtained, he contended that he was not liable to an action of covenant for not keeping the premises in repair: but it was held, that the parties evidently intended to covenant with each other, independently of the lease to be afterwards granted; and that the defendant, having had the full benefit which he could have enjoyed under the lease, could not dispute his liability on the covenant because the lease was not granted (*h*).

The anomalies connected with this branch of the law did not escape the vigilance of the Real property commissioners, who, considering the impediments thrown in the way of im-

(*g*) Fareley's case, Cro. Jac. 36; Salisbury dem. Cooke v. Hurd, Cowp. S. C., nom. Holder v. Farley, Mo. 753. 481.
Dugworth v. Radford, W. Jo. 402. (*h*) Pistor v. Cater, 9 Mees. & W. 315.

provement by the present system, recommended (*i*) that a power should be given to the copyhold tenant to grant a lease at rack rent for twenty-one years, out of his own interest, without the license of the lord; a recommendation, however, that has not been adopted.

By the late act, passed in consequence of their suggestions (*k*), lords of manors and their tenants were empowered to enter into an agreement for the commutation of the lord's rights for the payment of an annual sum by way of rent-charge on the lands in respect of which the commutation or enfranchisement might be made. And it was provided (*l*), that every tenant or occupier who should pay any such rent-charge, or any expenses legally chargeable under the act upon the land of which he should be such tenant or occupier, should be entitled to deduct the amount from the rent payable by him to his landlord, and should be allowed the same in account with his said landlord.

And a right of distress was given (*m*) to the person entitled to the rent-charge in case it should be in arrear for twenty-one days after any half-yearly day of payment, ten days' notice in writing being given or left at the usual or last known residence of the tenant in possession; provided that not more than two years' arrears should at any time be recoverable by distress.

By another act (*n*) made to amend and explain the act of 4 & 5 Vic. c. 35, an enfranchisement may be made, either wholly or in part, for the consideration of a grant of an annual rent in fee to be thenceforth charged on and issuing out of the lands enfranchised; and any commutation or enfranchisement may be made, either wholly or in part, for the consideration of a conveyance of lands parcel of the same manor as the lands commuted or enfranchised, and subject to the same uses and trusts as the lands commuted or enfranchised shall

(*i*) 3rd Real property report, p. 19.

(*k*) 4 & 5 Viet. c. 35, entitled "An act for the commutation of certain manorial rights in respect of lands of copyhold and customary tenure, and in respect of other lands subject to

such rights, and for facilitating the enfranchisement of such lands, and for the improvement of such tenures."

(*l*) Sect. 45.

(*m*) Sect. 47.

(*n*) 6 Viet. c. 23.

be subject to at the time of such commutation or enfranchisement (*o*); and the annual rent so granted shall be a rent-service, and thenceforth parcel of and appendant and appurtenant to the same manor as the lands enfranchised (*p*).

If the person for the time being seised in possession of such annual rent, or entitled to the receipt thereof, shall be so seised or entitled for a particular estate, (whether such estate shall have been subsisting at the time of the enfranchisement of such lands or not,) it shall be lawful for him, whether he shall be so seised or entitled in actual possession, or in remainder or reversion expectant on the determination of any estate for a term of years, to divide and apportion such annual rent, and to declare what part and proportion thereof shall be thenceforth severally charged upon each of the respective parcels of such lands between which such apportionment is intended to be made, and after such apportionment such annual rent shall be chargeable upon and payable out of such lands only, and in such parts and proportions only as shall be so declared. Provided nevertheless, that it shall not be lawful for any person so seised or entitled in respect of an undivided share only of such annual rent to divide and apportion such annual rent, unless the person for the time being enabled either by the act or otherwise to divide and apportion the same, as respects the other undivided share thereof, shall join in dividing and apportioning such annual rent (*q*).

If the person seised of such lands in possession, or entitled to the receipt of the rents, issues, and profits thereof, shall be so seised or entitled for a particular estate, (whether such estate shall have been subsisting at the time of the enfranchisement of such lands or not,) it shall be lawful for him, whether he shall be so seised or entitled in actual possession, or in remainder or reversion expectant on the determination of any estate for a term of years, and with the consent of the Copyhold commissioners, to concur in any division or appor-

(*o*) Sect. 1.

(*p*) Sect. 2.

(*q*) Sect. 4.

tionment of such annual rent, and to agree what part and proportion thereof shall be thenceforth severally charged upon each of the respective parcels of such lands between which such apportionment is intended to be made: Provided nevertheless that it shall not be lawful for any person so seised or entitled in respect of an undivided share only of such lands to concur in or agree to any such division or apportionment, unless the person for the time being enabled either by the act or otherwise to concur in such division or apportionment as respects the other undivided share of such land shall concur in or agree to such apportionment (*r*).

It is further provided (*s*) that a sub-lessee under any sub-lease, his executors, administrators, or assigns, shall not, in consequence of any charge under the act, either with an annual rent, or in consequence of any apportionment under the act either of an apportioned annual rent, or of any rent reserved in any lease, be liable to the payment of any greater sum of money than he would have been subject or liable to if such charge or apportionment had not been made.

If, at the time of the conveyance under the act, in consideration either wholly or in part of the commutation or enfranchisement of any lands held by copy of court roll, there shall be subsisting in the lands so conveyed any lease, (not being an underlease), the lessee under such lease, his executors, administrators, and assigns, shall pay, observe, and keep, to and with the person to whom such lands shall be so conveyed, or other the person for the time being seised of or entitled to such lands expectant on the determination of such lease, and his executors or administrators, the rent, reservations, covenants, conditions, and agreements, respectively reserved and contained in such lease, or such and so many or such part of the rent, reservations, covenants, conditions, and agreements, respectively reserved and contained in such lease, as are or ought to be thenceforth respectively paid, observed, and kept, in respect of the lands so conveyed;

and the person to whom such lands shall be so conveyed, or other the person so for the time being seised of or entitled, shall and may from time to time make or bring all such distresses, actions, suits, or entries, for non-payment of such rent or reservations, or for non-performance of the covenants, conditions, and agreements, in such lease respectively reserved and contained, as could, in case such conveyance had not been made, have been made or brought by the person making such conveyance, or other the person for the time being seised of or entitled to the reversion expectant on the determination of such lease; and that in all such distresses, actions, suits, and entries, the rent, reservations, covenants, conditions, and agreements, in such lease reserved and contained on the part of the lessee, his executors, administrators, or assigns, shall be deemed and taken to be annexed to an immediate reversion vested in the person to whom such lands shall be so conveyed, or other the person for the time being so seised of or entitled to such lands (*t*).

And if at the time of any commutation or enfranchisement under the act of 4 & 5 Vic. c. 35, or under the act of 6 & 7 Vic. c. 23, of any lands, there shall be subsisting in such lands any lease, (not being an underlease,) the lessee under such lease, his executors, administrators, and assigns, shall pay, observe, and keep, to and with the person for the time being seised of or entitled to the lands so commuted or enfranchised, and his executors or administrators, the rent, reservations, covenants, conditions, and agreements, respectively reserved and contained in such lease, or such and so many or such part of the rent, reservations, covenants, conditions, and agreements, respectively reserved and contained in such lease, as are or ought to be thenceforth respectively paid, observed, and kept, in respect of the lands so commuted or enfranchised; and the person for the time being seised of or entitled to the lands so commuted or enfranchised shall and may from time to time make or bring all such distresses, actions, suits, or

(*t*) Sect. 9.

entries, for non-payment of such rent or reservations, or for non-performance of the covenants, conditions, and agreements, in such lease respectively reserved and contained, as could have been made or brought by the person who would for the time being have been entitled to the lands so commuted or enfranchised in case such commutation or enfranchisement had not been made; and in all such distresses, actions, suits, and entries, the rents or reservations, covenants, conditions, and agreements, in such lease reserved and contained on the part of the lessee, his executors, administrators, or assigns, shall be deemed and taken to be annexed to an immediate reversion vested in the person for the time being seised of or entitled to the lands so commuted or enfranchised (*u*).

x.—*Tenant at Sufferance.*

A mere tenant at sufferance has no demisable estate; at least as against any one but himself (*x*).

x1.—*Tenant by Elegit; Statute Merchant; Statute Staple; and Recognizance in nature of a Statute Staple.*

The lease of tenant by elegit, statute merchant, statute staple, and tenant in possession under a recognizance in the nature of a statute staple, partake of the precarious nature of the lessor's interest, and is determinable at law by payment of the sum for which the lands were originally extended. But equity has sometimes adopted a different rule. In an early case (*y*), one Hudson gave a judgment for 400*l.* to the defendants, who were executors of one Short, to secure a debt of 220*l.* due from Hudson to Short. Hudson afterwards devised certain premises to the plaintiff, and died; and after his death the executors of Short extended a moiety of the

(*u*) Sect. 10.

Belcher, 3 East, 451.

(*x*) *Shopland v. Rydler*, Cro. Jac. 55, *Arg?* *Thunder dem. Weaver v.*

(*y*) *Doughty v. Stiles*, Rep. temp. Finch, 115.

lands so devised, and leased the same for seven years at a yearly rent of 25*l.* The plaintiff exhibited his bill against them to be relieved against the judgment, and to redeem the lease, and to bring the executors to an account; but it was held that the lease ought not to be impeached. The executors, however, were decreed to account for certain goods supplied by, and money received of, Hudson by their testator, and for the profits of the lands before the lease, and for the rent of 25*l.* per annum after it. And it was further decreed, that, on paying what was due to the defendants, they should acknowledge satisfaction on the judgment, and release and convey the extended premises to the plaintiff, free from all incumbrances made by them, except the lease.

Under a *feri facias*, the debtor's term for years remains in him until an actual assignment by the sheriff; and, therefore, a purchaser of it cannot make a valid lease of the legal estate before such assignment (*z*).

XII.—*Cestui que trust.*

A cestui que trust, having only an equitable estate is, of course, incapable, without the concurrence of his trustee, of conferring a legal interest (*a*). His demise may operate by way of estoppel (*b*), or give a good title in equity; but such a tenancy is too precarious to be relied on; for the lessee, being deemed at law a mere trespasser as against the trustee (*c*), is liable to eviction at law without previous notice to quit; and must seek for redress in equity. It is the better opinion that the statute 1 Rich. 3. c. 1. is now destitute of all operation whatever (*d*).

For the purpose of security, therefore, both trustee and

(*z*) *Playfair v. Musgrove*, 14 Mees. & W. 239; S. C. 3 Dowl. & Lown. 72.

(*a*) As to leases by trustees, see post Sect. IV. of this Chapter.

(*b*) See as to Estoppel, ante, p. 52.

(*c*) *Plowd.* 349. *Blake v. Foster*, 8

Term Rep. 487. 492.

(*d*) 1 Rich. 3. c. 1. See the 1st Chap. in *Sanders on Uses*, and particularly p. 45, 4th ed.; and p. 42, 5th ed. by *Sanders and Warner*; and *Gilb. on Uses*, by *Sugd.* p. 67, n.

cestui que trust should concur in a demise, as in the case of a mortgagor and mortgagee (*e*). The trustee should "demise and lease," and, on the part of the cestui que trust, words of demise should be inserted, as well as words of consent and approbation. If there be several cestuis que trust, the concurrence of all should be obtained; for if a trustee under a will concur with some but not all of the cestuis que trust in making a lease, which recites part only of the trusts, the lessee cannot hold in opposition to the other cestuis que trust, not parties to the lease: the circumstance of the recital rendering it incumbent on him to make further inquiry, he is considered as having had notice of the title of the other claimants under the will (*f*).

The rent should be reserved generally during the term, without specifying to whom; leaving the law to give it its due appropriation (*g*).

And the covenants, to make them run with the land, should be entered into with the trustee (*h*).

SECTION III.—WITH REFERENCE TO NUMBER AND CONNECTION.

I.—*Joint-tenants.*

Joint-tenants, holding (according to the technical phrase) *per my et per tout* (*i*), enjoy a singular and anomalous species of tenure. . During their joint ownership they constitute but one tenant of the whole land, and are then said to be seised *per tout*; but, for the purposes of alienation, each has an exclusive right to and dominion over a moiety; and in this sense, adopting Lord Coke's exposition (*k*), which is more

(*e*) Post, Sect. III. of this Chapter.

(*f*) *Malpas v. Aekland*, 3 Russ. 273.

(*g*) *Whitlock's case*, 3 Co. 69, b.
71, a.

(*h*) *Webb v. Russell*, 3 Term Rep.

393. *Stokes v. Russell*, 3 Term Rep.

678. *Russell v. Stokes*, 1 H. Blac. 562.

(*i*) Lit. s. 233. 2 Bla. Com. 132.

(*k*) Co. Lit. 136, a.

simple and intelligible than Littleton's (*l*), or Blackstone's (*m*), must be understood the expression that joint-tenants are seised or possessed *per my*.

To illustrate this position : If there be two joint-tenants, and one of them make a lease of the whole land at one time, and the other make a lease of the whole land at another time of the same day, the moiety only of each joint-tenant will pass. Each of them, being seised *per my et per tout*, may make a lease of the whole, but no more than his moiety will be affected by it. The terms granted, as they arise from the several interests of several persons, will be several and distinct, though the same in point of duration (*n*). Joint-tenants may, therefore, join in demising their estate, or either of them may demise his own undivided share to a stranger, or to his companion (*o*). So, where there are more than two, either of them alone may grant his share singly, or concur with any other or others in granting their shares jointly. If two of three, for instance, join in a lease, two undivided thirds of the land will pass (*p*).

Joint-tenants usually concur in demising, with one redendum ; the lessee's covenants being entered into with them and their heirs and assigns, or their executors, administrators, and assigns, according to the nature of the reversion ; but without any words of severance.

We may consider the quality of a lease ; first, where joint-tenants concur in granting it ; and, secondly, where either of them separately leases his own portion.

1. Where they concur, the lessee's interest continues notwithstanding the decease of either of the lessors, and the whole rent is payable to the survivor (*q*). So, if the lease be at will, the death of one of the lessors does not operate as a countermand of the tenancy, even for a moiety. All survives

(*l*) Lit. s. 288.

(*m*) 2 Bla. Com. 182.

(*n*) *Morris v. Barry*, 1 Wils. 1. And see *Bellingham v. Alsop*, Cro. Jac. 53.

(*o*) Co. Lit. 136, a. *Jurdain v. Steere*, Cro. Jac. 83.

(*p*) *Philpott v. Dobbinson*, 3 Mo. & Pa. 320.

(*q*) *Henstead's case*, 5 Co. 10, b. Doe dem. *Aslin v. Summersett*, 1 Barn. & Adol. 135, 140.

to the other; and, if the lessee continue his possession, the survivor may maintain an action for the whole rent on account of the privity (*r*). If two or more joint-tenants make a lease by parol, or deed-poll, reserving rent to one of them, the reservation will enure to both in respect of the joint reversion (*s*). If, however, the lease be by indenture, reserving rent to one, the other will be precluded by estoppel from disputing the reservation (*t*). But if one joint-tenant in fee take a lease for years from a stranger by deed indented, and die, the survivor will not be bound by the conclusion or estoppel; because he claims above and not under it (*u*).

Though the title as well as the estate of joint-tenants is undivided, yet each has his own particular portion. Their joint demise operates to a certain extent as a demise by each of his share; and, therefore, one of several joint-tenants who had joined in a demise from year to year, on giving due notice to quit, may recover his several share in ejectment on his several demise, without the concurrence of his co-tenants (*x*). But the true character of a tenancy from year to year under a joint demise by joint-tenants is not that the tenant holds of each the share of each so long as he and each shall please, but that he holds the whole of all so long as he and all shall please. It is competent, therefore, to either of the lessors to put an end to the tenancy as to the whole (*y*); and an ejectment may be maintained on the joint demise of all the lessors, though the notice to quit be given by one of them only (*z*).

In the case of *Right v. Cuthell* (*a*), where the premises in question had been demised for a term of twenty-one years, subject to a proviso, that, in case either landlord or tenant,

(*r*) *Henstead's case*, sup.

(*s*) *Sacheverel v. Frogate*, 1 Vent. 161; S. C., nom. *Sacheverell v. Walker*, Freem. K. B. 16. Lit. s. 346. Co. Lit. 47, a. 192, a.

(*t*) *Sacheverel v. Frogate*, or *Walker*, sup. Co. Lit. 47, a. 192, a. 214, a. Lit. s. 346.

(*u*) Co. Lit. 135, a.

(*x*) Doe dem. *Whayman v. Chaplin*, 3 Taunt. 120. Doe dem. *Aslin v. Summersett*, 1 Barn. & Adol. 135.

(*y*) Doe dem. *Aslin v. Summersett*, sup.

(*z*) *Ibid*.

(*a*) *Right dem. Fisher v. Cuthell*, 5 Esp. 149; S. C. 5 East, 491.

or their respective heirs, executors, &c., should be desirous at the expiration of the first seven or fourteen years of the term to determine the lease, and should give six months' previous notice in writing under his or their respective hand or hands to or for the other or others, or for the heirs, executors, &c., of the other or others of them, the term should cease; and the lessor died, having appointed Fisher, Nash, and Hyrons, his executors, it was held that notice given to the tenant by Fisher and Nash, on behalf of themselves and Hyrons, who was abroad, to quit the premises at the end of the first fourteen years of the term, was not sufficient. It will be observed that in this case the specific mode of putting an end to the term required the concurrence of all the joint-tenants, and that this mode was not pursued, a circumstance which distinguished it from *Doc dem. Aslin v. Summersett* (b).

If an entire rent be reserved on a joint demise, one of the lessors alone cannot maintain an action of debt for it (c). He may distrain; but then he must avow in his own right, and as bailiff to his co-tenant, to whom he is accountable (d). Payment, however, to one is payment to all (e).

2. One joint-tenant, as we have seen, may lease his share of the estate, in opposition to the express wish of his companion. And, as each of several joint-tenants in fee, or for their lives, has an estate not only for his own life, but for his companion's too, he may grant a lease for years of his own share to commence at a future day, nay even after his death (f),

(b) 1 Barn. & Adol. 141.

(c) Co. Lit. 180, b. Lit. s. 311.

(d) *Bonoyon v. Palmer*, 5 Mod. 71; S. C., nom. *Pullen v. Palmer*, 5 Mod. 150; *Carth.* 328; 3 Salk. 207. And see *Stedman v. Bates*, 1 Ld. Raym. 64; S. C. 1 Salk. 390; S. C., nom. *Stedman v. Page*, or *Page v. Stedman*, 5 Mod. 141; *Carth.* 364. See also *Decharms v. Horwood*, 10 Bing. 526.

(e) *Ibid.*

(f) *Harbin v. Barton*, Mo. 395; S. C. *Goldesb.* 187; S. C., nom. *Harbin v. Lohy*, Noy, 157; cited, *Cro. Jac.* 91;

2 Rol. 446. 474. 485. *Anon.* 2 And. 16. *Sharpner v. Hardenham*, Mo. 395. *Grute v. Loerof*, *Cro. Eliz.* 287; S. C. cited, Mo. 395. *Cart.* 155. *Clerk v. Clerk*, 2 Vern. 323. *Whitlock v. Horton*, *Cro. Jac.* 91; S. C., nom. *Whitlock v. Hartwell*, *Godb.* 146; Mo. 776; S. C., nom. *Whitlock v. Chartwell*, Noy, 14. *Smaleman v. Eigburrow*, 3 Bulstr. 273; S. C., nom. *Smalman v. Agborow*, *Cro. Jac.* 417; *J. Bridgm.* 42-3; 1 Rol. 401. 441. *Anon.* 2 Dy. 187, a. *Herbin v. Chard*, *Poph.* 96. 3 Salk. 204. Lit. s. 289.

the term in the meantime existing in interest, though not in possession (*g*). And the same rule prevails in the case of joint-tenants for years (*h*).

In this respect a lease is distinguishable from a devise, which is no present binding disposition upon the devisor himself, as he may revoke his will; and, therefore, the devise, not taking effect till his death, comes too late to prevent the survivorship, which is preferred as the elder title (*i*). So, all grants or charges by one joint-tenant out of the land fall off with his life, and cannot affect the survivor; because being no immediate disposition of the land itself, that land comes whole and entire to the survivor under the first title, and, consequently, overreaches all intermediate charges or grants thereout by the other joint-tenant who is dead (*h*).

A joint-tenant, however, cannot, unless empowered by the late act to amend the law of real property (*l*), make a valid lease at law for more than his moiety, or other aliquot share; although he should prove the survivor (*m*). But he may, by way of contract in equity, bind the portion which he has the possibility of taking by survivorship.

If the deed, though purporting to be the lease of all, be executed by only one of the joint-tenants, it operates on the share of that one only, who may maintain an action for payment of his share of the rent reserved to all (*n*), or distrain for the same in any part of the land (*o*).

One of the peculiarities attending the relation of joint-tenants for life renders it necessary to guard against a severance, the effect of which is to constitute a tenancy in common, and thus destroy the interest which each co-tenant previously had in the land for his companion's life, as well as his own (*p*);

(*g*) *Grute v. Locroft*, sup.

(*h*) *Co. Lit.* 184, b. 135, a.

(*i*) *Bacon on Leases*, p. 131.

(*k*) *Ibid.* Lit. s. 239.

(*l*) 8 & 9 Vict. c. 106. s. 6, set out ante, p. 49.

(*m*) *Whitlock v. Horton*, *Hartwell*, or *Chartwell*, sup. *Bellingham v. Al-*

sop, *Cro. Jac.* 52-3.

(*n*) *Cartwright's case*, or *Bond v. Cartwright*, cited, 1 Vent. 136. 162. 2 Keb. 795. And see *Co. Lit.* 192, a.

(*o*) 3 Bulstr. 133.

(*p*) *Farington's case*, 1 Dy. 67, a. 2 P. Wms. 740. *Co. Lit.* 191, a.

and, therefore, if one of two joint-tenants for life lease for years to commence after his death, and the co-tenant by surrendering sever the joint-tenancy, the lease will determine by the death of the lessor (*g*). So, if one of two joint-tenants for life make a lease for sixty years, if he and his companion live so long, it will determine by the death of either; although, after the lease, the lessor surrender his moiety, and take back a new estate (*r*). But it seems that if one of two joint-tenants for their lives lease for years, and afterwards convey his share to his co-tenant, the latter cannot defeat the lease on the death of the lessor, for, as to the lessee, he is under the joint-tenant of whom he purchased (*s*).

The marriage of a feme sole, joint-tenant with another, will not sever the tenancy; and, accordingly, a lease for years made by her and her husband will continue in operation after her decease against the surviving joint-tenant (*t*); nor can a husband sever the joint-tenancy of a lease granted to him and another, by assigning a moiety to his wife (*u*).

If one of two joint-tenants for lives make a lease of his moiety, reserving rent to himself and his heirs, the term will continue after his death; but the lessee will hold discharged of rent; for the surviving joint-tenant claims from the original feoffor, and paramount the lease and the reservation (*x*), and the heirs cannot claim it, having no reversion or interest in the land (*y*); but Bacon (*z*) adds a *quære*, whether the executors or administrators cannot maintain an action of debt or covenant, either upon the covenant

(*g*) 3 Salk. 206.

(*r*) Daniel v. Waddington, Cro. Jac. 377; S. C. 1 Rol. 309; 3 Bulstr. 130.

(*s*) Lord Aburgavenny's case, 6 Co. 78, b.

(*t*) Smalman v. Agborow, Cro. Jac. 417; S. C., nom. Smaleman v. Eigburrow, 3 Bulstr. 272. 1 Rol. 401. 441. J. Bridgm. 42-3.

(*u*) Moyse v. Giles, 2 Vern. 385;

S. C. Prec. Ch. 124; 1 Eq. Ca. Ab. 293. pl. 2.

(*x*) Anon. 2 Dy. 187, a. J. Bridgm. 44. Blaxton v. Heath, Poph. 145. Daniel v. Waddington, 3 Bulstr. 133. Shelley's case, 1 Co. 96, a.; S. C. Mo. 139. Shury v. Brown, 3 Bulstr. 330. Co. Lit. 185, a. 318, a.

(*y*) Bacon on Leases, p. 131; Bac. Ab. tit. Leases, (I) 5.

(*z*) Ibid.

in law, or express covenant, for payment of the money, if there be any.

To obviate any question on the subject in the case of a lease by one joint-tenant in fee, the joint-tenancy should previously be severed, by which means the rent will survive to the heir or devisee of the reversion after the lessor's death.

The effect produced on the joint-tenancy by the lease of one only of the tenants depends, in the first place, on the quantity of estate enjoyed by the lessors, and, in the second, on the quantity of estate granted to the lessee. If A. and B. be joint-tenants in fee, and one of them lease to C. for life, a freehold interest, the jointure is severed during the lease, and C. and B. for the time will hold as tenants in common (*a*), and A. and B. will resume their joint-tenancy on the determination of C.'s lease in the lifetime of A. and B. (*b*). But if A. lease to C. for years, a chattel interest only, it appears that the jointure is neither absolutely severed nor suspended for the term; but A. and B. will continue joint-tenants as before (*c*).

So, if they join in a lease to two persons, habendum the one moiety to the one for life, and the other moiety to the other for life, the reversion is severed, being dependent on several freeholds (*d*). And the same effect was formerly produced by a joint demise to an abbot and a secular man for the term of their lives (*e*).

On the other hand, if there be joint-tenants for years, the underlease of one so effectually severs their tenancy, as to render it incapable of revival, though the underlease determine during their joint lives. For the remainder of their own term, as well after the conclusion of the underlease, as during its continuance, they hold the reversion as tenants in common (*f*). The reason assigned is, because a term for a

(*a*) Lit. s. 302. Co. Lit. 192, a.

(*d*) Co. Lit. 191, b. 192, a.

(*b*) Co. Lit. 193, a. 214, a.

(*e*) Ibid.

(*c*) Co. Lit. 195, a. 2 Prest. Abst.

(*f*) Sym's case, Cro. Eliz. 33. Co.

53. But see Clerk v. Clerk, 2 Vern. Lit. 192, a. 199, a. Lit. s. 319.
323, cont.

small number of years is in contemplation of law as high an interest as one for a greater number (*g*).

A lease by one joint-tenant of his share to his co-tenant operates *quodam modo* as a severance, or rather extinguishment, of the jointure for the time (*h*). If there be three or more, the lessee would hold the share demised to him as tenant in common with the others (*i*).

II.—*Tenants in common.*

Tenants in common are considered as holding several freeholds, or other distinct interests, according to the quantity of their estates, the only unity among them being that of possession (*k*). The rule of survivorship does not constitute an ingredient in their tenure.

On the decease of either of the lessors, the reversion of his share, according to the nature of his estate, will descend to his heir, or devolve on his executor, and carry with it the title to the rent in respect of that share; the lessee and the survivors or survivor holding in common during the continuance of the lease (*l*).

Each tenant in common, therefore, may grant his undivided share for any interest commensurate with his own, either to a stranger, or his companion (*m*), or two, three, or more, or all, of several tenants in common may concur in one lease, which, however, will operate as the distinct demise of each tenant of his part, and not as the joint demise of all (*n*); and should be so stated in pleading (*o*).

(*g*) Co. Lit. 192, a.

(*h*) Co. Lit. 186, a.

(*i*) *Jurdain v. Steere*, Cro. Jac. 83.
Blackasper's case, Noy, 13, scmb. S. C.

(*k*) Co. Lit. 189, a. Lit. s. 292.
Pullen v. Palmer, 3 Salk. 207. *Burne v. Cambridge*, 1 Mood. & Rob. 539.

(*l*) Co. Lit. 199, a. *Wilkinson v. Hall*, 1 Bing. N. C. 713. 718; S. C. 1 Scott, 675; 1 Hodg. 170.

(*m*) *Anon.* Mo. 71. pl. 194. *Snelgar*

v. Henston, Cro. Jac. 611; S. C., nom. *Hudson v. Snelgar*, 2 Rol. 212. *Story v. Johnson*, 2 Yo. & Col. Exch. 586. 596.

(*n*) Bac. Ab. Joint-tenants, (II) 1. *Mantle v. Wollington*, Cro. Jac. 166. *Heatherley dem. Worthington v. Weston*, 2 Wils. 232. *Burne v. Cambridge*, 1 Mood. & Rob. 539.

(*o*) *Challoner v. Davies*, 1 Ld. Raym. 400-4.

There is no estoppel in such case, because an interest passes from each lessor (*p*).

A declaration in debt by the survivor of two tenants in common alleging that he and the deceased were seised of the entirety of the premises demised cannot be supported (*q*).

A reservation of a rent of 20*s.* to the lessors will entitle them to only one sum of 20*s.* (*r*).

We may here add a few words respecting the right of tenants in common to join or sever in action in respect of their demise.

If the action be in the realty, like ejectment, tenants in common cannot be joined as plaintiffs; for, being brought in respect of the title to the land, and that title being several, the action follows its nature, and must be several (*s*). So, they must sever in an avowry for rent, which, like the old assize (*t*), is in the realty (*u*); unless the rent be in its nature indivisible, as a horse or a hawk (*x*). And, in like manner, they could not join in a writ of waste against their lessee during the continuance of the term, as in that form of action the land wasted would have been recoverable (*y*); though it was otherwise if the term had expired, when damages only could be obtained (*z*).

The authorities are not uniformly consistent as to the right of tenants in common to join or sever as plaintiffs, where the action is in the personalty, as in cases of debt or covenant.

(*p*) Bac. Ab. Joint-tenants, (II.) 1.
1 Rol. Ab. 877. l. 48. 52. Burne *v.*
Cambridge, 1 Mood. & Rob. 539. 541.
Brooks *v.* Foxcroft, Clayt. 137. Anon.
Clayt. 140. pl. 253. See, as to leases
by estoppel, ante, p. 52.

(*q*) Burne *v.* Cambridge, sup.

(*r*) Co. Lit. 197, a.

(*s*) Lit. s. 314. Co. Lit. 197, b.
290, a. Keilw. 114, a. case, 49. Cut-
ting *v.* Derby, 2 W. Blac. 1077. Moore
v. Fursden, 1 Show. 342. Mantle *v.*
Wollington, Cro. Jac. 166. Doe dem.
Bryant *v.* Wippell, 1 Esp. 360. Hen-

therley dem. Worthington *v.* Weston,
2 Wils. 232.

(*t*) Abolished by 3 & 4 W. 4. c. 27.
s. 36.

(*u*) Lit. s. 317. Pullen *v.* Palmer,
3 Salk. 207. Anon. 2 Sid. 2. Harrison
v. Barnby, 5 Term Rep. 249. Whitley
v. Roberts, M'Clel. & Yo. 107.

(*x*) Lit. s. 314. Co. Lit. 197, b.

(*y*) Anon. Mo. 34. pl. 110. Anon.
Mo. 40. pl. 127. The writ of waste
was abolished by 3 & 4 W. 4. c. 27.
s. 36.

(*z*) Anon. Mo. 40. pl. 127.

We may first notice the action of debt; and afterwards that of covenant.

Littleton expressly denies their right to distinct actions of debt, stating, that “if two tenants in common make a lease of their tenements to another for a term of years, rendering to them a certain rent yearly during the term, if the rent be behind, &c., the tenants in common shall have an action of debt against the lessee, *and not divers actions*, for that the action is in the personalty” (*a*); and this opinion appears to have been entertained by the court in the case of *Kitchin v. Buckley* (*b*), notwithstanding a remark to the contrary in *Siderfin* (*c*).

The more numerous, as well as the more modern authorities, however, are of a different tendency, and appear to warrant the following distinctions:—

If tenants in common concur in a joint demise for years, with a reddendum of an entire rent to them, they *may* be co-plaintiffs in an action of debt for recovering the rent (*d*); or each may bring a distinct action for his undivided share (*e*). In other words, they may join or sever at their election.

If the lease be for life they must sever (*f*).

But although they may be co-plaintiffs on their joint demise, yet, as a joint lease by tenants in common is in effect a demise of their separate shares, the survivor of two lessors, tenants in common, cannot maintain an action of debt against the lessee for the whole rent, declaring on a joint demise (*g*).

(*a*) Lit.s. 316; cited by Parke, B., in *Bradburne v. Botfield*, 14 Mees. & Wel. 567.

(*b*) *Kitchin and Knight v. Buckley*, or *Bunkley*, T. Raym. 80; S. C. 1 Lev. 109; 1 Keb. 565. 572; S. C., nom. *Kitchin v. Compton*, 1 Sid. 157. And see *Cole v. Banbery*, 1 Sid. 49, and *Greenwood's case*, Clayt. 28.

(*c*) 1 Sid. 402.

(*d*) Anon. Godb. 283. pl. 404. *Midgeley v. Lovelace*, Carth. 289; S. C. Holt, 74. *Martin v. Crompe*, 1 Ld.

Raym. 341. *Burne v. Cambridge*, 1 Mood. & Rob. 539.

(*e*) *Huntley's case*, 3 Dy. 326, a.; S. C. 1 And. 21; Benl. 226. Anon. Godb. 223. pl. 404. *Midgeley v. Lovelace*, sup. *Martin v. Crompe*, sup. *Harrison v. Barnby*, 5 Term Rep. 249. *Powis v. Smith*, 5 Barn. & Ald. 851; S. C. 1 Dow. & Ry. 490. *Burne v. Cambridge*, sup.

(*f*) Anon. Godb. 283. pl. 404.

(*g*) *Burne v. Cambridge*, sup.

Tenants in common taking their estates derivatively by devise or purchase must sever (*h*).

If one of two tenants in common bring an action of debt for his share of the rent, he must not declare for the amount, as a specific sum, but the demand must be for a moiety of the whole rent (*i*); though the necessity for so declaring does not extend to an action of covenant (*k*).

If, however, tenants in common make several demises of their undivided shares, either by distinct instruments, or the same instrument, they *must* sever in action; for a joint action can only be maintained on a joint demise or contract (*l*).

Actions of covenant are governed by different principles.

If the cause of action be one and entire, tenants in common, being covenantees, *must* join, although the covenant be entered into with them and each and every of them (*m*).

If the covenantees can sue jointly, they are bound to do so (*n*). And where several tenants in common concurred in a joint demise, and took a joint covenant for payment of the rent, and two died, it was held that the survivors might maintain an action of covenant for the entire rent, though the covenant was to pay it to the lessors according to their several and respective rights and interests therein (*o*).

So, in a late case (*p*), where A. and B. were seised in fee of the legal estate of an undivided fourth of certain heredita-

(*h*) Huntley's case, sup. Midgeley v. Lovelace, sup. Wilkinson v. Hall, 1 Bing. N. C. 713; S. C. 1 Scott, 675; 1 Hodg. 170. And see Cutting v. Derby, 2 W. Blae. 1077; and Greenwood's case, Clayt. 28.

(*i*) Lit. s. 314. Co. Lit. 197, b. Martin v. Crompe, 1 Ld. Raym. 341. Midgeley v. Lovelace, sup. Henniker v. Turner, 4 Barn. & Cres. 157. 159; S. C. 6 Dow. & Ry. 72.

(*k*) Henniker v. Turner, sup.

(*l*) Powis v. Smith, 5 Barn. & Ald. 351; S. C. 1 Dow. & Ry. 490. Wilkinson v. Hall, 1 Bing. N. C. 713; S. C. 1 Scott, 675; 1 Hodg. 170.

(*m*) Slingsby's case, 5 Co. 13, b.;

S. C. Anon. Jenk. 262, case, 63; S. C., nom. Beckwith's case, 3 Leon. 160; Anon. 2 Leon. 47, semb. S. C. Windham's case, 5 Co. 3, a. Eccleston v. Clipsham, 1 Saund. 153; S. C. 2 Keb. 338. 339. 347. 385. Withers v. Bircham, 3 Barn. & Cres. 254; S. C. 5 Dow. & Ry. 106. Foley v. Addenbrooke, 4 Q. B. 197; S. C. 3 Ga. & Dav. 64.

(*n*) Foley v. Addenbrooke, 4 Q. B. 197. 208; S. C. 3 Ga. & Dav. 64. Petrie v. Bury, 3 Barn. & Cres. 353.

(*o*) Wallace v. McLaren, 1 Man. & Ry. 516.

(*p*) Bradburne v. Botfield, 14 Mees. & Wel. 559.

ments and mines, in trust for C. and her husband; and D. was seised of another undivided fourth; and E. was seised of the legal estate of the remaining undivided moiety, in trust for F. and G.; and by indenture A. and B., C. and her husband, D., and E., and F. and G., according to their several and respective estates, rights, and interests, demised to the defendant the hereditaments and mines for a certain term, with a reddendum to the several persons above named respectively, and to their respective heirs and assigns, according to their said several and respective estates, &c., the yearly rents thereafter mentioned; and the lessee covenanted with the same persons, *and each and every of them, their and each and every of their heirs, executors, administrators, and assigns*, (amongst other things,) to keep the premises in repair, and the same so repaired to deliver up, at the end or other determination of the term, to the lessors (naming them) and their heirs and assigns respectively; it was held that this was a joint covenant, on which none but all the covenantees, or the survivors during their lives, or the survivor of them, could sue, for the name of no one covenantee could be rejected. Parke, B., said (*q*), that *Hopkinson v. Lee* (*r*) was precisely in point, and good law.

If the cause of action be separate and distinct, tenants in common, covenantees, must sue severally, though the covenant be joint in terms; but the several interest and several ground of action must distinctly appear, as in the case of covenants to pay separate rents to tenants in common upon demises by them (*s*).

Whether one of several tenants in common, lessors, can sue on a covenant with all to repair, appears to be undecided. That all can sue is perfectly clear (*t*).

Tenants in common, not being themselves the covenantees, but taking their reversion derivatively from the lessor, may elect to join or sever in suing on the covenants which run

(*q*) 14 Mees. & Wel. 564.

& Cres. 410; S. C. 5 Man. & Ry. 299.

(*r*) 14 Law Jour. N. S. Q. B. 101.

(*t*) *Bradburne v. Botfield*, 14 Mees.

(*s*) See cases in note (*m*), p. 134.
sup. and *Servante v. James*, 10 Barn.

& W. 559, 574.

with the land (*u*). And if one of two tenants in common bring an action of covenant for non-payment of his share of the rent, he need not declare, as in debt, for a moiety of the whole rent, but may demand the specific sum due (*v*).

If a house and land be let together, and the reversion of the house be granted to A. for years, and of the land to him in fee, by separate deeds, he need not, though holding distinct reversions, bring more than one action against the lessee for breach of the covenants contained in the lease (*x*).

Where tenants in common concur in granting a lease, each of them usually demises according to his respective estate and interest, the instrument containing one habendum of the whole estate, but a separate reddendum to each of the lessors, and a separate covenant for payment of the rent. But, as under a lease in this form the lessors, as we have seen (*y*), *must* bring separate actions of debt for their respective portions of the rent, or of covenant for damages in respect of their several shares, a course of proceeding harassing to the lessee, without a corresponding advantage to the lessors, it seems better that the demise should be joint, with one reddendum of the entire rent to the lessors, simply, which will not prevent their taking it as tenants in common, the rent following the reversion (*z*), and a covenant with them for payment, in which case they may join in an action of covenant, or sue separately in debt, at their option (*a*).

If a lessor devise the reversion of the lands demised to two persons, as tenants in common, and the lessee pay the whole rent to one of them, after express notice from the other not to do so, he may be distrained upon by the latter for his moiety so paid over (*b*).

(*u*) *Midgeley v. Lovelace*, Holt, 74; S. C. Carth. 289. *Simpson v. Clayton*, 4 Bing. N. C. 753; S. C. 6 Scott, 469. And see *Sampson v. Easterby*, 9 Barn. & Cres. 505; S. C. 4 Man. & Ry. 422; judgment affirmed in Exch. Chamb., 6 Bing. 644; 1 Crompt. & Jerv. 105. *Henniker v. Turner*, 4 Barn. & Cres. 157; S. C. 6 Dow. & Ry. 72. *Cutting v.*

Derby, 2 W. Blac. 1077.

(*v*) *Henniker v. Turner*, sup.

(*x*) *Pyot v. St. John*, Cro. Jac. 329; S. C., affirmed in error, 2 Bulstr. 102.

(*y*) Ante, p. 135.

(*z*) Lit. s. 314. Co. Lit. 197, a.

(*a*) Ante, pages 133, 134.

(*b*) *Harrison v. Barnby*, 5 Term Rep. 247.

On a bill for partition, the lessee of either tenant in common is a necessary party; and his costs must be borne by his lessor (*c*).

III.—*Coparceners*.

The estate of coparceners partakes of the properties of a joint-tenancy and of a tenancy in common; for though coparceners constitute but one heir (*d*), and have, as to strangers, one entire freehold in the land, while it remains undivided; yet for many purposes, and among them for the purpose of leasing, they have several freeholds (*e*). As the rule of survivorship does not prevail, the share of each descends to her heirs (*f*). This species of tenure is aptly designated by Coke (*g*) as “the rarest kind of inheritance that is in the law.”

Coparceners, therefore, may demise their respective undivided portions distinctly, or concur in demising the whole land by one deed; but in the latter case the lease operates, as with tenants in common, as the separate demise of each of her share (*h*), and must be so pleaded (*i*). If they join in a lease, they hold the rent reserved in common (*k*); and, therefore, the remarks already made (*l*) as to the form of leases by tenants in common are applicable to the form of leases by coparceners.

Coparceners cannot sever in an avowry for rent (*m*). If one distrain, she must avow in her own right, and also as bailiff to the other for the entire rent (*n*). She cannot avow for a moiety only in her own right (*o*).

(*c*) *Cornish v. Gest*, 2 Cox, 27. And see *Story v. Johnson*, 2 Yo. & Col. Exch. 536.

(*d*) *Decharms v. Horwood*, 10 Bing. 526; S. C. 4 Mo. & Sc. 400.

(*e*) Lit. s. 241. Co. Lit. 163, b. 164, a.

(*f*) 2 Bla. Com. 138.

(*g*) Co. Lit. 164, a.

(*h*) *Milliner v. Robinson*, Mo. 682.

(*i*) *Ibid*.

(*k*) 2 Prest. Abst. 74.

(*l*) Ante, p. 136.

(*m*) *Page v. Stedman*, Carth. 364; S. C., nom. *Stedman v. Page*, 5 Mod. 141; S. C., nom. *Stedman v. Bates*, 1 Ld. Raym. 64; 1 Salk. 390. *Decharms v. Horwood*, 10 Bing. 526; S. C. 4 Mo. & Sc. 400. And see *Anon. Mo. 34*, pl. 110.

(*n*) *Ibid*.

(*o*) *Ibid*.

If two coparceners be seised of land in tail, which has been let for 10*l.*, one of them may, under the statute, 32 Hen. 8. c. 28, let her part or moiety for 5*l.*; for, although differing in form or quality, the rent is in substance the true and ancient rent (*p*).

A lease for life by one of two coparceners in fee does not sever the coparcenery (*q*); though a lease for life by one or both prevented for the time a writ of partition between them; because, they did not hold the freehold together, and the writ must have been brought against the tenant of the freehold (*r*). The writ, however, would lie notwithstanding a lease for years, as the freehold was unaffected (*s*).

IV.—*Husband and Wife.*

The granting of leases by husband and wife seised in right of the wife having been facilitated by the legislature, it is proposed to consider the subject; 1st, as it exists under the common law, independently of the enabling statute, 32 Hen. 8. c. 28: 2ndly, with reference to the operation of that statute; and, 3rdly, with reference to the effect of the late act for the abolition of fines and recoveries (*t*); a few general remarks relative to the powers vested by marriage in the husband, over the real property of his wife being premised, to render the section the more intelligible.

1st, Lands held by a feme sole for an estate of inheritance, or of freehold not of inheritance, become, at common law, by marriage so far the property of the husband, that he alone may alien them for the joint lives of himself and his wife. But his sole conveyance cannot prejudice her in the event of her proving the survivor. She cannot impeach it during coverture, in consequence of her legal incapacity; but no

(*p*) Mountjoy's case, 5 Co. 5, a. b. Co. Lit. 14, b.

(*q*) Co. Lit. 192, a.

(*r*) Co. Lit. 167, a. The writ of

partition was abolished by the statute 3 & 4 W. 4, c. 27. s. 36.

(*s*) Ibid. F. N. B. 62, H.

(*t*) 3 & 4 W. 4, c. 74.

sooner is she relieved by his death from the restraints of marriage than her title to the enjoyment of the estate revives.

Over the lands of which the feme was possessed for a chattel interest only, the husband has an exclusive and absolute disposing power, as against his surviving wife (*u*); though, on his failing to deal with them in his lifetime, they will belong to his widow in preference to his personal representatives (*x*). If he die before her, he cannot pass them by his will (*y*); but if he survive her, they become his own absolute property (*z*).

The husband's power of leasing his wife's freehold estates is also subject, at common law, to restrictions which disqualify him from ensuring the continuance of his demise beyond the period of their joint lives (*a*), unless he become entitled as tenant by the curtesy, in which case the lessee may remain in possession during the remainder of the term, subject to sooner determination by the death of the lessor (*b*).

If the wife die first without issue by him, so that he is not tenant by the curtesy, it is the better opinion that he can, under a lease at common law, maintain debt or covenant, or avow for rent accruing due in the interval between the wife's death, and the entry of her heir (*c*).

Before the statute of 3 & 4 W. 4. c. 74, the only common law mode of securing the lessee's enjoyment against the acts of the surviving wife was to obtain an assurance from her and her husband by a fine or recovery (*d*).

- (*u*) Co. Lit. 46, b. 300, a. b. 351, a. Druce *v.* Denison, 6 Ves. 394. Wildman *v.* Wildman, 9 Ves. 177. Oglan-
der *v.* Barton, 1 Vern. 396. Yong *v.*
Radford, Hob. 3. Dr. & Stud. lib. 1.
c. 7. 18th ed. by Muchall, p. 21.
- (*x*) Ibid. Anon. Poph. 4. 5. Blax-
ton *v.* Heath, Poph. 145. Sym's case,
Cro. Eliz. 33. Loftus's case, Cro. Eliz.
278. Druce *v.* Denison, 6 Ves. 396.
- (*y*) Ibid. Plowd. 413. Co. Lit. 351, a.
- (*z*) Co. Lit. 300, a. b. 351, a.
- (*a*) Jenk. Cent. 293, case, 39. Blake
v. Foster, 8 Term Rep. 487. Hill *v.*
Saunders, 2 Bing. 112; S. C. 9 J. B.
- Mo. 238; affirmed in error, 4 Barn. &
Cres. 529.
- (*b*) Powtrel's case, Ow. 83; S. C.
Dal. 65; 1 Dy. 46, b. marg. Miller *v.*
Maynewaring, W. Jo. 354; S. C., more
fully reported, Cro. Car. 397. Dixon
v. Harrison, Vaugh. 46.
- (*c*) 9 H. 6. 43. 21. Bro. Ab. tit.
Avowrie, pl. 123. Bro. Ab. tit. Dette,
pl. 7. Vaugh. 46. Bac. Ab. tit.
Leases, (C.) 1. But see Jenk. Cent.
293, case, 39. 1 Dy. 28, b. 29, a.
- (*d*) Now abolished by 3 & 4 W. 4.
c. 74. Husband and wife may pass
the wife's land in the city of London

During the coverture, however, a lease by husband and wife of her lands is so far the husband's only, that he alone may sue the lessee on the covenants (*e*); nor is it a variance though the lease prove, on production, to be made by the husband and wife (*f*).

Considerable contrariety of opinion prevailed before the enabling statute, and perhaps still exists (*g*), in cases not complying with the provisions of that act, or of the act for the abolition of fines and recoveries (*h*), as to the effect produced on the lessee's interest by the death of the husband in the wife's lifetime; the question being, whether the lease becomes void on that event, or voidable only, and therefore capable of confirmation. The early cases, teeming with distinctions founded on no solid or rational principle, tend to involve the point in much obscurity.

In the first place, the authorities concur in stating, that, at common law, a lease for years *by parol* by the husband alone, or by the husband and wife, of her freehold lands, though available during the husband's life, was void, not voidable only, as against the wife surviving; and, therefore, that her acceptance of rent after her husband's death would not estop her from evicting the lessee (*i*); and Dyer (*k*) notes that such was the common opinion of all the judges at that day. The reason alleged was, that the wife was not a party (*l*)

by bargain and sale enrolled, the wife being first separately examined by the mayor or other officer. 1 Com. Dig. 565, tit. Baron & Feme, (G. 4.) 2 Inst. 673. Hob. 225. 34 & 35 Hen. 8. c. 22. And a similar custom is said to prevail in Norwich, and some other cities, boroughs, and corporate towns. Ibid. 1 Prest. Abst. 336.

(*e*) Bret v. Cumberland, Cro. Jac. 399; S. C. 1 Rol. 359; 3 Bulstr. 163. Beaver v. Lane, 2 Mod. 217.

(*f*) Arnold v. Revault, 1 Brod. & Bing. 443; S. C. 1 J. B. Mo. 66. But see cont., Gardiner v. Norman, Cro. Jac. 617, the first page of that number. Wallis v. Harrison, 5 Mees. & Wel.

142; S. C. 7 Dowl. Pr. Ca. 395; 2 Horn & Hurl. 65.

(*g*) Chamb. on Leases, 221. Com. Landl. & Ten. 40. 1 Rep. Husb. & W. 91.

(*h*) 3 & 4 W. 4. c. 74, noticed post, p. 158.

(*i*) Walsal v. Heath, Cro. Eliz. 656; S. C. Sav. 111; 1 Leon. 192. 204. Bateman v. Allen, Cro. Eliz. 437-8. Childes v. Wescot, Cro. Eliz. 481. 1 Leon. 204. Parry v. Hindle, 2 Taunt. 181.

(*k*) Turney v. Sturges, 1 Dy. 91, b. Villers v. Beaumont, 2 Dy. 146, b.

(*l*) Bro. Ab. 96, Barre, pl. 27, cites 21 H. 6. 24. 5.

or privy (*m*) to the lease; and that a woman during coverture could not agree without deed; for the agreement could not be proved by simple surmise, but by matter in deed (*n*); though, in declaring upon a lease by husband and wife, it was unnecessary to state that the demise was by deed, the court assuming that fact without express allegation (*o*).

The right of the surviving wife to resume the possession, where the lease was originally void (*p*), was not confined to the wife, but extended to parties claiming under her. Thus, where husband seised in right of his wife made a parol lease alone, and afterwards he and she levied a fine, and died, it was held that the conuzee might avoid the lease; for, being made by the baron only, it was void against the feme, and no acceptance could make it good (*q*).

The point still retains some degree of practical importance, notwithstanding the operation of the act, 32 Hen. 8. c. 28, on the leases by husband and wife of her lands of inheritance, and the act for abolishing fines and recoveries (*r*). Parol leases, being unaffected by those statutes, which, we shall see (*s*), enabled without disabling, retain their common law efficacy, except so far as they are altered by the statute of frauds (*t*); and as that statute (*u*) converts all estates granted by parol, except leases not exceeding the term of three years, whereon at least two third parts of the full improved value

(*m*) 26 H. 8. 2. 2. 1 Bro. Ab. Cui in vitâ, l.

(*n*) 15 E. 4. 18. 4. 1 Bro. Ab. Acceptance, pl. 6. Shep. Touch. 280. 1 Dy. 91, b. Greenwood *v.* Tyber, Cro. Jac. 564; S. C., nom. Tyler *v.* Fisher, Palm. 29.

(*o*) Bateman *v.* Allen, Cro. Eliz. 438. 1 Dy. 91, b. marg. Childes *v.* Wescot, Cro. Eliz. 481; S. C., nom. Wiscot's case, 2 Co. 60, b. 61, a.; cited, Cro. Car. 527. Plowd. 431, a.

(*p*) Contrâ, where the lease was voidable, see post.

(*q*) Harvy *v.* Thomas, Cro. Eliz. 216; S. C. 1 Leon. 247; cited, 2 Co. 77, b.

1 Rol. 402. J. Bridgm. 45.

(*r*) The enabling act does not extend to cases where the husband is seised in right of his wife of an estate of freehold not of inheritance. See post, p. 154; and the Fines and Recoveries abolition act requires the wife's conveyance to be *by deed*. See post, p. 158.

(*s*) See post, pages 152. 158.

(*t*) 29 Car. 2. c. 3. The 3rd section of the late act to amend the law of real property, 3 & 9 Vict. c. 106, affects only leases required by law to be in writing.

(*u*) Sect. 2.

is reserved, into estates at will, the cases above cited are still applicable to such leases as fall within the exception of that act.

In the second place, supposing the demise to be *by deed*, and made by both husband and wife, the cases from a very early period, while they show that it was not absolutely determined by his death, though originally granted at will (*x*), admit a confirmatory power in the surviving wife. Thus we find, that where baron and feme joined in a lease of lands of the feme, and she accepted rent accrued due after her husband's death, she could not afterwards enter and enjoy the lease, because she had affirmed its continuance by her own act (*y*). The circumstance of the lease being granted for years (*z*), or for life (*a*), made no difference. Nor was it necessary that a rent should be reserved, for the surviving wife might affirm the lease by bringing an action of waste, or accepting fealty (*b*).

So, Dyer, in his report of the case of *Turney v. Sturges* (*c*), notes, that the common opinion among all the judges at that day was, that if husband and wife made a lease for a term of years before the statute, 32 Hen. 8. c. 28, by parol, reserving rent to them, and afterwards the wife accepted the rent of the termor when she was sole, this would not estop her from avoiding the lease, *if it was not by indenture*, because her assent was necessary to the commencement of the lease, and this ought to have been by deed. From which case we may infer, that such a lease by indenture, to which she was a party, was confirmable by the surviving wife, and therefore, voidable only. And the like point was shortly afterwards determined by Dyer, Stamford, and Browne, in opposition to the opinion of Brooke (*d*).

(*x*) *Henstead's case*, 5 Co. 10, b.
Rol. Ab. tit. Estate, (Z.) pl. 5. Co.
Lit. 55, b.

(*y*) *Bro. Ab. Acceptaunce*, pl. 6. 10.
 3 H. 6. 53. 22. *Bro. Ab. Resceit*, 70.
Marsh v. Curtes, 2 And. 42. 1 *Rol.*
Ab. tit. Baron and Feme, (Y.) pl. 2. 3.

Keilw. 10, a.

(*z*) 10 H. 6. 24. pl. 33. [B.]

(*a*) *Ibid.* F. N. B. 7th ed. 446.

(*b*) *Anon. Hutt.* 102. *Jackson v.*
Mordant, Cro. Eliz. 112.

(*c*) *Turney v. Sturges*, 1 Dy. 91, b.

(*d*) *Anon.* 2 Dy. 159. pl. (36).

So, where husband and wife being seised to them and the heirs of the husband of certain lands, granted a lease for years, the court held that it was the lease of the feme till she disagreed (*e*).

Besides other cases to the same effect (*f*), in a comparatively recent one decided in the court of King's Bench (*g*), and in one of still later occurrence in the court of Common Pleas (*h*), the same doctrine was maintained. The report of the latter case represents Mr. Justice Lawrence to have said, that if the demise was by the deed of the husband and wife, it would have determined by the husband's decease, unless the wife had afterwards confirmed it. The meaning of this passage is obvious, though not very clearly, perhaps not accurately, expressed. It is not true that the lease would determine on the husband's death, unless afterwards confirmed; for it is a well-established principle, that an interest actually void or determined cannot be continued or revived by subsequent confirmation. Nor is the converse true; for the interest of the lessee, if confirmable, or, in other words, voidable, and not void, which the sentence admits, would not be determined by the husband's decease, although the widow should refuse to confirm it; to avoid it, she must enter (*i*), or pursue some course equivalent to entry, such as bringing trespass (*k*), and then, and not before, will the lease be at an end (*l*). The words of the learned judge were probably misreported.

Some of the cases, however, draw a distinction between leases granted by the husband and wife, and leases granted by the husband alone of her lands; and treat the former as capable of confirmation, and therefore voidable only; the latter, as incapable of confirmation, and therefore void.

(*e*) *Jackson v. Mordant*, Cro. Eliz. 112. *Broome v. Mordant*, Ibid. *Smalman v. Agborow*, Cro. Jac. 417; S. C. 1 Rol. 401. 441; *J. Bridgm.* 42.

(*f*) *Shipwith v. Steed*, Cro. Eliz. 769. *Greenwood v. Tyber*, Cro. Jac. 563; S. C. Palm. 29.

(*g*) *Doe dem. Collins v. Weller*, 7 Term Rep. 473.

(*h*) *Parry v. Hindle*, 2 Taunt. 130. See also *Hill v. Saunders*, 2 Bing. 112; S. C. 9 J. B. Mo. 233; 4 Barn. & Cres. 529.

(*i*) *Smalman v. Agborow*, Cro. Jac. 417.

(*k*) Bac. Ab. tit. Leases, (C.) 1.

(*l*) *Jackson v. Mordant*, Cro. Eliz. 112. *Broome v. Mordant*, Ibid.

Thus we see in 7 Ass. 12 pl. 18 (*m*), that baron leased certain lands [of which he and she were scised] in right of the wife for term of years, and died, and the wife, after the death of the baron, and during the term, gave the same with livery of seisin to the plaintiff, and it was held that the feoffee held by good title, and that the estate in the term was defeated. The report adds, "*Sic Nota*, as soon as the baron died, the term of the termor was determined; for the wife was always *t' de frankt'*." So, according to Brooke's Abridgment (*n*), it was said by Paston, that if husband alone leased lands of the wife for life, she should not have waste after his death, for she was no party to the lease, and hence it followed that the wife by acceptance of rent, where she was no party to the lease, should not be bound, if it was upon a lease for years, but might enter; but, if it was upon a lease for life, she was put to a *cui in vitâ* (*o*). Again, taking the cases in chronological succession, we find in Brooke's Abridgment (*p*), that if baron and feme joined in a lease of the land of the wife, rendering rent, and after his death she accepted the rent, she should be bound; but that it was otherwise where the baron alone made a gift or lease, reserving rent, and he died, and the wife accepted rent; there she should not be bound: *Nota diversitie quod nullus contradixit*. So it appears in the same Abridgment (*q*), that if husband and wife made a feoffment in fee of the lands of the wife, rendering rent to them and the survivor, her acceptance of rent after her husband's death would bar her of her *cui in vitâ*; but that if the baron alone made a feoffment in fee of her land, reserving rent, her acceptance after his death would not bar her;

(*m*) The Index to the vol., tit. Baron and Feme, and Bro. Ab. tit. Leases, pl. 21, refer, erroneously, to 7 Ass. pl. 19.

(*n*) Bro. Ab. tit. Barre, pl. 27. 21 H. 6. 24. 5.

(*o*) This was before the passing of the act of 32 Hen. 8. c. 28. s. 6, explained by 34 & 35 Hen. 8. c. 22, which invested her, and the persons

claiming beneficially after her death, with a right of entry, and consequently with the power of bringing a possessory as distinguished from a real action. The distinctions, however, are now abolished. See 3 & 4 W. 4. c. 27. s. 36.

(*p*) Bro. Ab. Acceptance, pl. 6. 15 E. 4. 18. 4.

(*q*) Bro. Ab. Cui in vitâ, pl. 1. 26 H. 8. 2. 2.

because she was not privy to the lease. The words of Brooke, translated, are:—if the baron alone make a feoffment or lease with reservation, and the wife accept the rent, this shall not bind her, for she was not privy.

To these may be added the case of *Gardiner v. Norman* (*r*). Husband and wife signed and sealed a lease by indenture of her land, and joined in executing a letter of attorney to a third party to deliver the deed upon the land in their names. An action having been brought by the husband, the defendant took an exception to the declaration, on the ground of its proceeding as upon a lease by the husband, and not by him and wife. It was held, however, that, as the wife was incapable of making a letter of attorney (*s*), the delivery by the attorney was void as to the wife, and so the lease was the husband's only; but that, had the deed been delivered on the land by the husband and wife, it would have been a good lease for both, and the plaintiff ought to have declared accordingly (*t*); that, as it was, the lease, being the husband's only, was not voidable, but void against the wife; and, therefore, that the declaration was good.

It is evident that the reason advanced in support of the supposed distinction between leases by the husband alone, and leases by the husband and wife, is opposed to every principle of law which regulates the rights and powers of husband and wife during coverture; and it is yet to be shown how a woman disabled by marriage from transferring her estate, or binding herself at law (*u*) by contract, otherwise than by matter of record, can alter the quality of a lease granted of her lands during coverture, by simply concurring

(*r*) *Gardiner v. Norman*, Cro. Jac. 617, (the first page of that number). And see *Anon. Hutt.* 102. 3 Leon. 72. 4 Leon. 74.

(*s*) *Gardiner v. Norman*, sup. *Wilson v. Riche*, Yelv. 1; S. C. 1 Brownl. & Gold. 134. *Phinmer v. Hockett*, Noy, 133. 2 Brownl. 248. But see cont. *Anon. v. Hopkins*, Cro. Car. 165, and *Cooper's case*, 2 Leon. 200. See

also 3 Bulstr. 13.

(*t*) But see cont., as to the necessity for joining her as plaintiff in an action, *Bret v. Cumberland*, Cro. Jac. 399; S. C. 1 Rol. 359; 3 Bulstr. 163. *Beaver v. Lane*, 2 Mod. 217. *Arnold v. Revoult*, 1 Brod. & Bing. 442; S. C. 4 J. B. Mo. 66.

(*u*) As to her contracts in equity with relation to her separate estate, see ante, p. 48.

with her husband in the deed of demise. It is apprehended that the distinction would receive but little consideration at the present day. Indeed, we are not destitute of authority (even of later date than that of an opposite tendency) to show that a lease of the wife's land, though not executed by her, is not void, but voidable only, on her husband's death.

The position has more than once been urged in argument (*v*) without contradiction. So, in Broooke's Abridgment (*x*), it is stated, that if tenant in tail, or a man seised in right of his wife, lease lands for a term of years, and die, and the wife, or the issue in tail, accept rent, the lease is affirmed good. It is right, however, to notice, that this passage in Brooke differs from the Year Book, 21 H. 7. 38. pl. 47, of which it professes to be an abridgment, in an important particular. Conesby there said, "that a lease which was void could be made good by matter *ex post facto*; as if tenant in tail lease lands for years, rendering rent, and die, and the issue in tail accept the rent; or if a lease be made by baron and feme of the lands of the feme, rendering rent; by acceptance of rent, the feme and the issue in tail have made the lease which was void good." According to Brooke's Abridgment, the lease in question was made by the husband alone; but the Year Book expressly recognises the wife as a party; and it is rather singular that Conesby made no distinction between a voidable and a void interest, as appears from his declaration, that a lease which was void could be made good by matter *ex post facto* (*y*).

Later authorities, however, bearing more expressly on the point, are entitled to greater confidence. Thus, in *Jordan v. Wikes* (*z*), the husband alone had made a lease of his wife's lands for the purpose of trying the title; and the court clearly held, that it was voidable only by her after his death, and not void.

From a modern case (*a*) also we may collect that Lord

(*v*) By Serjt. Gawdy, in *Browning v. Beston*, Plowd. 137, and afterwards confirmed by Sir Thomas Coventry, Solicitor-General, in *Smalman v. Ag-burrough*, 1 Rol. 402.

(*x*) Acceptance, pl. 10.

(*y*) And see 10 H. 6. 24. pl. 83. [B].

(*z*) *Jordan v. Wikes*, Cro. Jac. 332; S. C., nom. *Wilkes v. Jordan*, Hob. 5.

(*a*) *Parry v. Hindle*, 2 Taunt. 180.

Mansfield's opinion was, that a demise by the husband alone, seised in right of his wife, was not determined by his death. His lordship's words were:—"A husband seised in right of his wife may, and usually does, demise alone during the coverture (*b*): when he dies, all the rent accrued up to the time of his decease does not go over with *the reversion* to the wife; it is assets in the hands of the husband's executors. The wife has nothing to do with the demise or the rent." Now, as the reversion survives to the widow on the husband's decease, and as a reversion cannot subsist without a tenancy, and as a tenancy by sufferance is not sufficient for the purpose (*c*), it seems to follow that the estate of the lessee of the husband is voidable only on his death; for if it were actually void, the determination of the tenancy would be a determination of the reversion (*d*).

An attempt to reconcile these jarring decisions would prove a fruitless task, and in all probability render confusion more confused. A late eminent writer (*e*), however, has suggested the possibility of reconciling them, by distinguishing between leases for life and years; and he urges, that as, in the former case, the estate commences by livery, it can only be avoided by entry, but that in the latter the lease is absolutely void and determined by the husband's death: but it is submitted, that this conclusion is not justified by the authorities.

On the whole, perhaps, we may conclude, that a lease not pursuant to the enabling statute, or the fines and recoveries abolition act, by the husband alone, or by the husband and wife, of her lands, whether it be for life, or years, instead of being determined on his death in her lifetime, will continue in operation until avoided by her; and that any act of confirmation by her, or by an after-taken husband (*f*), or

(*b*) This assertion is questionable. The lease is never made by the husband alone, if he professes to demise in pursuance of the enabling statute of Henry the 8th.

(*c*) Dy. 23, b.

(*d*) This reasoning is supported by

the case of *Miller v. Maynewaring*, W. Jo. 354; S. C., more fully reported, Cro. Car. 397, 5th resolution.

(*e*) Serjt. Williams; see his note to *Wotton v. Hele*, 2 Saund. 180, 180, a. b.

(*f*) Anon. 2 Dy. 159, a. pl. (36). 3 Salk. 3.

persons claiming in privity to her (*g*), will confer on the lessee an estate absolute and unavoidable for the remainder of his term. The opinion of many distinguished members of the profession (*h*), moreover, favours this conclusion, which was evidently entertained, on a balance of authorities, by the learned author (*i*) of the title Leases in Bacon's Abridgment (*k*); although it must be admitted that some of the marginal cases there cited do not warrant that opinion.

The lease, on being determined by the widow, is deemed to have been void as against her *ab initio* (*l*); and after the avoidance the lessee may plead *non dimiserunt* to an action counting on the demise of husband and wife (*m*).

The privilege of electing to confirm or avoid the lease, though exerciseable by an after-taken husband (*n*), or by parties claiming in privity to the wife (*o*), her heir for instance, is not capable of delegation (*p*).

Nor can a party claiming paramount the wife exercise it. Accordingly, where husband and wife, in right of the wife, being joint-tenants with a third person, by indenture demised the moiety of the land for years, and the wife died in the lifetime of her husband, it was held, that the surviving joint-tenant could not disturb the lease, as he derived his title to the premises paramount the feme, and not under her (*q*).

Whether the principle of confirmation by the surviving wife extends to the case of a demise by way of mortgage has been the subject of different opinions (*r*). There are two

(*g*) *Smalman v. Agborow*, Cro. Jac. 417; S. C. 1 Rol. 401. 441; J. Bridgm. 42; 3 Bulstr. 272.

(*h*) 1 Prest. Abst. 335. 4 Byth. Conv. by Jarn. 327; and Sweet's ed. vol. 4, p. 243. Com. Landl. & Ten. 41. Woodf. Landl. & Ten. 19. 3rd ed. by Harrison. And see post, p. 151.

(*i*) L. C. B. Gilbert.

(*k*) Bac. Ab. Leases, (C.) 1.

(*l*) *Thetford v. Thetford*, 1 Leon. 192; S. C. Sav. 109; cited, 3 Co. 27, b.

(*m*) *Ibid*.

(*n*) *Anon.* 2 Dy. 159, a. pl. (36). 3 Salk. 3.

(*o*) *Smalman v. Agborow*, Cro. Jac. 417; S. C. 1 Rol. 401. 441; J. Bridgm. 42; 3 Bulstr. 272.

(*p*) *Cadee v. Oliver*, 3 Leon. 153; S. C. Cro. Eliz. 152.

(*q*) *Smalman v. Agborow*, sup. 3 Mod. 300.

(*r*) Roper, in his Treatise on "Husband and Wife," is in favour of the wife's capacity to confirm. The late Mr. Jacob, the Editor of the last impression of that work considers Mr. Roper's conclusion questionable; and thinks that the decisions are not inconsistent. Mr. Coventry, on the other

cases on the subject (*s*). In the first, husband and wife, seised in right of the wife in fee of a share of the New River Water, by deed, without fine, made a lease for 1,000 years, by way of mortgage, reserving a peppercorn rent. On the death of the husband, the wife received the profits, and paid the interest. The mortgagee, having brought a bill to foreclose the wife, insisted that the lease was not actually void, but voidable by her after her husband's death, and that her payment of interest, when discoverd, amounted to an election on her part to affirm the lease. "In this case," said the Master of the Rolls, "there ought to have been a fine, it being the inheritance of the wife; if there had been a rent reserved, the acceptance of such rent by the wife, when discoverd, would have affirmed the lease; but here is no acceptance, and the lease is of an incorporeal thing, out of which rent could not well be reserved (*t*): wherefore, the lease expiring by the death of the husband, the mortgage is also thereby determined, and nothing remaining to foreclose. And though the court will not narrowly look into the title, yet when all this is admitted on both sides, and appears upon the opening, why should I pronounce a vain decree?" The bill was dismissed without costs. This decision requires a word or two of comment. In the first place, it is not clear whether the remark, "that if there had been a rent reserved, the acceptance of such rent by the wife, when discoverd, would have affirmed the lease," was intended to apply to the case of a lease by way of mortgage, or to the case of a common demise; nor, supposing it to apply to the case of a mortgage, and assuming the possibility of reserving a rent out of the property in question, whether acceptance of a peppercorn, the only rent usually reserved on a demise by way of mortgage, would have operated as a confirmation. The words "but here is no acceptance, and the lease is of an incorporeal

hand, declares that the authorities are contradictory. See *Pow. Mortg. by Coventry*, vol. 2, p. 723. n. (Q).

(*s*) *Drybutter v. Bartholomew*, 2 P.

Wms. 127; *S. C.* 2 *Eq. Ca. Ab.* 132. pl. 4. *Goodright dem. Carter v. Straphan*, *Cowp.* 201; 1 *Dougl.* 53. n. [17].

(*t*) See as to this, *ante*, p. 27.

thing, out of which rent could not well be reserved," seem to imply the necessity of a rent being reserved, in order to enable the surviving wife to confirm the lease; but that proposition cannot be maintained, if, in accordance with some authorities (*u*), the power of the surviving wife to confirm a lease on which rent has not been reserved be admitted. Acceptance of rent, though perhaps the best, is not the only evidence of an intention to give stability to a voidable estate; various other acts, such as a distress (*x*), the prosecution of an action of waste (*y*), or even expressions, as, "God give you joy of your lease" (*z*); "I am content to accept the rent" (*a*), being deemed equivalent to acceptance. If the Master of the Rolls rested his judgment, as he appears to have done, on the necessity of a reservation of rent, the foundation of it is scarcely secure. The case, though an authority that payment of interest alone would not amount to a confirmation of the demise, seems to justify a conclusion that the mortgage would have been supported against the wife, had it consisted of a corporeal hereditament, accompanied by her acceptance of rent, when discovert; and thus to admit the principle, by acknowledging her competency to confirm under any circumstances.

In the other case upon the point (*b*), decided half a century afterwards in the court of King's Bench, the facts were as follow:—By indenture dated in 1737, Elizabeth Carter and her husband demised, by way of mortgage, the premises in question, of which he and she were seised in her right, for the term of 99 years, at a peppercorn rent. Three exhibits were produced, all subsequent to the death of Charles Carter, the husband. The first was an account stated, consisting, among other articles, of a receipt for rent of one of

(*u*) Anon. Hutt. 102. Jackson v. Mordant, Cro. Eliz. 112.

(*x*) Doc dem. Flower v. Peek, 1 Barn. & Adol. 423.

(*y*) Anon. Hutt. 102. The writ of waste was abolished by 3 & 4 W. 4. c. 27. s. 36.

(*z*) Anon. 4 Leon. 4.

(*a*) Anon. Dy. 159, u. pl. (36).

(*b*) Goodright dem. Carter v. Straphan, Cowp. 201; 1 Dougl. 53. n. [17]. And see Clinton v. Hooper, 1 Ves. jun. 177.

the houses, from 1755 to 1760, out of which was deducted an article for interest due, a balance struck, and the account signed by Elizabeth Carter. The second was as follows:—23 May, 1763. I do hereby surrender the possession of a house belonging to me at Reading, late in the occupation of Mr. Collins, but now empty, to Mr. Thomas Sanders and Mr. William Smith, executors of Mr. William Greening, deceased, the mortgagee thereof. Signod, Elizabeth Carter: witness, John Lewis. The third ran thus:—23 May, 1763. Mr. Miles, I do hereby direct you to attorn tenant for your house and shop at Reading, from Lady-day last, to Mr. Thomas Sanders and Mr. William Smith, executors of Mr. William Greening, the mortgagee of the said premises, and to pay them all rent that shall become due for the same from that time: and I desire you will pay the rent that was due at Lady-day last to the same person as you formerly paid your rent to for my use: Signed, Elizabeth Carter: witness, John Lewis.—Lord Mansfield, who delivered the judgment of the court, after observing, that in strictness a fine was the proper method for a married woman to part with her right, and animadverting on the injustice of the wife's attempt to set aside the mortgage, continued thus:—"Mr. Wallace at the trial put it upon the footing of leases by husband and wife, reserving rent or no rent, which the authorities say are not void, but only voidable by the wife after the husband's death, and if she ratifies them she is bound. It was answered that those authorities were by way of exception to the general rule of law, which says, the deed of a married woman is void, and they were allowed of for the sake of agriculture and tillage: that this, it is true, is a lease for 99 years, and a century ago the court would not have seen further; but now, it is said, the court must look further, and see the real intent of the deed, namely, that it was a mortgage. We are all of opinion that the answer is a good one, and that the exception to the general rule was allowed of for the advancement of agriculture and tillage. We are also of opinion, that the court ought to look into the substance of the deed, and to see with the

same eyes as the rest of the world: it is in substance a mortgage, though in form a lease for 99 years. But we think we have good authority to say, that the wife is nevertheless bound by it, and that her subsequent acts set up this mortgage against her." Thus the cases appear to be consistent; and as *Drybutter v. Bartholomew* admitted the wife's power to confirm; and as judgment was given against the wife in the case of *Goodright dem. Carter v. Straphan*, on the ground of her redelivery of the mortgage deed operating as a confirmation, we may perhaps conclude that the demise by husband and wife of her freehold lands by way of mortgage, by simple deed, without an instrument of record, is a voidable and not a void interest in the mortgage on the death of the husband in the lifetime of the wife.

The student may be cautioned in this place against the adoption of a too prevailing notion, usually the result of indolence, that these discussions are rather speculative than useful. Though the enabling statute, to which we may now direct our attention, materially extended the leasing powers of husband and wife over the wife's freehold estates, he will not fail to perceive that questions relating to such of their leases as are not in conformity with that statute, or the act for the abolition of fines and recoveries (*c*), and they are numerous, must be referred for solution to the common law: and hence we perceive the application of the cases already cited in this division to the purposes of modern practice.

We now proceed to the consideration of the enabling statute (*d*), so far as it is applicable to leases granted by husband and wife. That statute enacted, "that all leases thereafter to be made of any manors, lands, tenements, or other hereditaments, by writing indented under seal, for term of years, or for term of life, by any person or persons being of full age of twenty-one years, having any estate of inheritance either in fee-simple, or in fee-tail, in their own right, or in the right of their wives, or jointly with their wives, of any

(*c*) 3 & 4 W. 4. c. 74.

(*d*) 32 Hen. 8. c. 23.

estate of inheritance, made before the coverture or after, should be good and effectual in the law against the lessors, their wives, heirs, and successors, and every of them, according to such estate as was comprised and specified in every such indenture of lease, in like manner and form as the same should have been if the lessors thereof and every of them, at the time of making of such leases, had been lawfully seised of the same lands, tenements, and hereditaments, comprised in such indenture, of a good perfect and pure estate of fee-simple thereof to their own only uses," on the observance of the same conditions as by the act in question were imposed upon tenants in tail (*e*) and ecclesiastical persons; the third section of the act providing, that the wife be made a party to every such lease which thereafter should be made by her husband, of any manors, lands, tenements, or hereditaments, being the inheritance of the wife; and that every such lease be made by deed indented in the name of the husband and his wife, and she to seal the same; and that the ferm and rent be reserved to the husband and to the wife, and to the heirs of the wife, according to her estate of inheritance in the same; and that the husband shall not in anywise alien, discharge, grant, or give away, the same rent reserved, nor any part thereof, longer than during the coverture, without it be by fine (*f*) levied by the said husband and wife; but that the same rent shall remain, descend, revert, or come, after the death of such husband, unto such person or persons, and their heirs, in such manner and sort as the lands so leased should have done if no such lease had been thereof made."

Leases, therefore, made in pursuance of this statute will continue in operation during the term, notwithstanding the death of the wife, whose heir, though entitled to the rent, cannot eject the lessee, or enter into possession without being guilty of a trespass (*g*).

(*e*) As to which, see ante, p. 66,
et seq.

(*g*) *Hill v. Saunders*, 2 Bing. 112;
S.C. 9 J. B. Mo. 238; in error, 4 Barn.

(*f*) Fines were abolished by 3 & 4
W. 4. c. 74.

& Cres. 529.

The construction of the conditions imposed by the act alike on husbands and wives, tenants in tail, and ecclesiastical bodies, having undergone investigation in a preceding page (*h*), it will only be necessary to point out in this place such few peculiarities of the statute as exclusively affect demises by husbands and wives.

The statute does not extend to cases where the husband and wife are seised in her right of an estate of freehold not of inheritance (*i*). The validity, therefore, of leases derived under such estates must be referred to the rules of the common law, or to the powers conferred by the late act for abolishing fines and recoveries (*k*), to which attention will shortly be more particularly directed.

If a husband purchase land to him and his wife and their heirs, it seems that a lease for years made by him alone will bind the surviving wife. Such a lease is rendered effective by the body of the act, and does not fall within the words or intent of the proviso (*l*).

Where lands were given to husband and wife and the heirs of their two bodies, and the husband died leaving issue by the wife, and she made a lease of the lands according to the statute of 32 Hen. 8, it was doubted whether the lease was good against the issue, as the statute said that the lease should be good against the lessor and his heirs, and the issue did not claim as heir to the wife only, but as heir of both husband and wife; but Windham and Rhodes, Justices, agreed that the lease should bind the issue by the statute (*m*).

As the act does not authorise demises of copyhold lands as against the lord, a lease by the husband of a feme copyholder in fee for a term not warranted by the custom, nor by the lord's license, will operate as a forfeiture

(*h*) Ante, p. 66, *et seq.*

(*i*) Co. Lit. 44. Hargr. n. (2).

(*k*) 3 & 4 W. 4. c. 74.

(*l*) *Smith v. Trinder*, Cro. Car. 22, per Yelverton, Harvey, and Croke;

Hobart doubted.

(*m*) Anon. Godb. 102. pl. 119. The doubt mentioned in the text was entertained by Fenner, J.

during the husband's life; reversible, however, by the surviving wife (*n*).

So, if a husband seised of a manor in right of his wife lease a copyhold, parcel thereof for years, by indenture, and die, the copyhold quality of the lands demised will not be destroyed as to the wife; her right to demise by copy reviving on her husband's death (*o*).

Care must be taken to reserve the rent conformably to the mode required by the act. Where a coparcener in tail, and the husband of a deceased coparcener, being tenant by the curtesy, joined in demising the lands entailed, reserving the rent to them and their heirs, it was held that the lease was not protected by the statute, as the rent was not reserved to the donee of the estate tail and the heirs of her body inheritable thereto (*p*).

A mere contract by the husband for a lease of his wife's freehold lands will not be enforced against her surviving, whatever may be the consideration (*q*).

Leaseholds for years of which the husband is possessed in right of his wife, being unaffected by the enabling statute, are subject, as we have seen (*r*), to his common law power of alienation. His right to dispose of the term, either absolutely, partially, or conditionally, is unquestionable (*s*). He may confer by demise an immediate interest and possession; or may underlet for a term to commence even after his death (*t*); and the lessee will be entitled to the term in exclusion of the surviving wife; though she will be entitled to that part of the term of which the husband makes no disposition (*u*).

(*n*) *Hedd v. Chalener*, Cro. Eliz. 149. *Saverne v. Smith*, Cro. Car. 7; S. C. 2 Rol. 344. 361; Palm. 383; Bendl. 131; S. C., nom. *Smiths v. Severne*, Bendl. 147, the second page of that number.

(*o*) *Conesbie v. Rusky*, Cro. Eliz. 459, the second page of that number.

(*p*) *Thomson's case*, Latch, 45.

(*q*) *Earl of Darlington v. Pulteney*,

Cowp. 260. 267. *Anon.* Freem. Ch. Rep. 224, case 296. 1 Scho. & Lef. 71.

(*r*) *Ante*, p. 139.

(*s*) *Ante*, p. 139.

(*t*) *Anon.* Poph. 4. *Harbin v. Chard*, Poph. 96-7. *Harbin v. Barton*, Mo. 395. *Grute v. Locroft*, Cro. Eliz. 287; S. C. cited, Mo. 395; 1 Co. 155, a.; Cart. 155.

(*u*) *Ante*, p. 139.

In like manner, the husband may dispose of the trust of a term created in favour of the wife before marriage, unless the trust move from him, or be created with his privity and consent (*v*), in which case his consent should be testified by his execution of the deed of trust (*x*).

In a case in Modern reports (*y*), a husband possessed of a term in right of his wife, and divorced à mensâ et toro, was, on the urgent request of counsel, restrained by injunction from disposing of it; so that the merits of the case might come before the court.

Of a mere possibility of survivorship, as if lands be demised to husband and wife for their lives, remainder to the survivor of them for years, he cannot dispose so as to bind the wife surviving (*z*). So, if a woman be guardian in socage, a lease by her and her husband of the infant's land is voidable by her on his decease (*a*).

It is not definitively settled whether a contract by the husband for a lease of his wife's term is, as against her surviving, tantamount in equity to an actual legal disposition.

In *Steed v. Cragh* (*b*), indeed, it was expressly declared that the husband's contract was such a lien as would bind the right in whose hands soever it might come, and would be good against the wife surviving; but as no trace of that case is discoverable in the Registrar's book, its authority has been questioned (*c*). The point was agitated before Lord Eldon, and his impression was clearly in favour of the validity of the contract (*d*). After expressing a wish that a search should be made for precedents, his lordship observed, that if the ques-

(*v*) Sir Edward Turner's case, 1 Vern. 7; S. C. 1 Eq. Ca. Ab. 58, pl. 2. Pitt v. Hunt, 1 Vern. 18; S. C. 1 Eq. Ca. Ab. 58, pl. 3; 2 Ch. Ca. 73. Bates v. Dandy, 2 Atk. 207-8. Jewson v. Moulson, 2 Atk. 42. Tudor v. Samyne, 2 Vern. 270; S. C. 1 Eq. Ca. Ab. 53, pl. 4. Prec. Ch. 419. Lord Carteret v. Paschal, 3 P. Wms. 201. Draper's case, 1 Freem. Ch. Rep. 29. Roupe v. Atkinson, Bunb. 162. Donne v. Hart, 2 Russ. & Myl. 360. But see

Hardr. 496; and Doyly v. Pearsall, Freem. Ch. Rep. 138, cont., which cannot be supported.

(*x*) Pitt v. Hunt, sup.

(*y*) Anon. 9 Mod. 43.

(*z*) Lampet's case, 10 Co. 51, a. Poph. 5. Co. Lit. 351, a.

(*a*) Osborn v. Carden, Plowd. 293.

(*b*) Steed v. Cragh, 9 Mod. 42; S. C. 2 Eq. Ca. Ab. 37.

(*c*) See 6 Ves. 403.

(*d*) Druce v. Denison, 6 Ves. 365.

tion were untouched by decision, he apprehended that analogy to other cases would make out that an assignment in equity was for this purpose as good as an assignment at law. But he said that without prejudice.

Where the husband having a term of years in right of his wife underlets, and dies during the underlease, it is well understood, though the cases on the subject are confused and contradictory (*e*), that his executors, and not the wife, are entitled to the rent for the residue of the lease, particularly if it be specially reserved to him and his executors (*f*), notwithstanding the reversion survives to the wife (*g*). The words of Lord Coke are, "If a man be possessed of a term of forty years in right of his wife, and make a lease for twenty years, reserving a rent, and die, the wife shall have the residue of the term, but the executors of the husband shall have the rent; for it was not incident to the reversion, for that the wife was not a party to the lease" (*h*). Whether the circumstance of the wife's being a party to the lease would make any difference, as the concluding words of the passage just quoted seem to intimate, is not stated. In a modern work of deserved celebrity (*i*) it is stated, "that if the wife be party to the lease, and the rent be expressly limited to her and the husband and the survivor, the wife surviving the husband is clearly entitled; and probably the same rule would be held to apply, if the wife were a party to

(*e*) Loftus's case, Cro. Eliz. 279. Perk. s. 834. *Blaxton v. Heath*, Poph. 145; S. C., nom. *Blackston v. Heap*, Godb. 279. According to Popham's report of this case, it appears that Montague, C. J., Crook, and Houghton, thought that the wife should not have the rent; and of the same opinion was Hobert, C. J. of the Common Pleas; and that Crook said that this was a special reservation, [being to the husband, his executors and assigns,] and, therefore, the executors should have it, and not the wife. Godbolt, on the other hand, reports that Houghton and Crook, Justices, against Montague, C. J., (Doddridge being absent,) thought

that the rent was gone; but that it was agreed by them all that the executors of the husband should not have it; and that Montague held that the wife should have it. And see *Norton v. Harvey*, 1 Vent. 259. *Drew v. Bayly*, 2 Lev. 100. 1 Rol. Ab., Baron and Feme, (G.) pl. 11. *Druce v. Denison*, 6 Ves. 385. 394.

(*f*) *Blaxton v. Heath*, Poph. 145.

(*g*) Sym's case, Cro. Eliz. 33.

(*h*) Co. Lit. 46, b. *Saunders v. Beale*, 2 Vern. 62-3; S. C. 1 Eq. Ca. Ab. 69. pl. 9.

(*i*) 4 Byth. Prec. by Jarm. 328; and Sweet's ed. vol. 4, p. 243.

the lease, and the reservation were general, and not expressly to her or the husband ; for it may be concluded that it was for this purpose alone that the husband could have required her concurrence." The learned writer, however, quotes no case in support of this position. He adds "that if the reservation were expressly to the husband, this would exclude all inference in favour of the wife; and the rent, though she were a party, would undoubtedly belong to the husband."

The late act "for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance" (*k*), has further tended to facilitate alienation by married women, by relieving them of the conditions formerly essential to their conveyances.

By this act it is declared (*l*), that, after the 31st day of December, 1833, it shall be lawful for every married woman, in every case, except that of being tenant in tail (*m*), by deed to dispose of lands of any tenure, and also to dispose of, release, surrender, or extinguish, any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, as fully and effectually as she could do if she were a feme sole ; save and except that no such disposition, release, surrender, or extinguishment, shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as by the act is directed ; provided always that the act shall not extend to lands held by copy of court roll of or to which a married woman, or she and her husband in her right, may be seised or entitled for an estate at law, in any case in which any of the objects to be effected by the present clause, could, before the passing of the act, have been effected by her in concurrence with her husband by surrender into the hands of the lord of the manor of which the lands may be parcel.

And it is further enacted (*n*), that the powers of disposition

(*k*) 3 & 4 W. 4. c. 74.

(*l*) Sect. 77.

(*m*) For which provision is made

by the 40th section of the act; and see ante, p. 37.

(*n*) Sect. 73.

given to a married woman by the act shall not interfere with any power which, independently of the act, may be vested in, or limited, or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under the act she may be prevented from so doing, in consequence of such power having been suspended or extinguished by such disposition.

And further (o), that every deed to be executed by a married woman for any of the purposes of the act (except such as may be executed by her in the character of protector for the sole purpose of giving her consent to the disposition of a tenant in tail) shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a judge of one of the superior courts at Westminster, or a master in Chancery, or before two of the perpetual commissioners, or two special commissioners, to be respectively appointed as by the act is provided.

And further (p) that in those cases where, by reason of residence beyond seas, or ill health, or any other sufficient cause, any married woman shall be prevented from making the acknowledgment required by the act before a judge, or a master in Chancery, or any of the perpetual commissioners, it shall be lawful for the court of Common Pleas at Westminster, or any judge of that court, to issue a commission specially appointing any persons therein named to be commissioners to take the acknowledgment by any married woman to be therein named of any such deed; provided always that every such commission shall be made returnable within such time to be therein expressed as the said court or judge shall think fit.

Section 84 provides, that when a married woman shall acknowledge any such deed, the judge, master in Chancery, or commissioners, taking such acknowledgment shall sign a memorandum, to be indorsed on, or written at the foot, or in the margin, of such deed, which memorandum, subject to any alteration which may from time to time be directed by the

court of Common Pleas, shall be to the following effect, videlicet: "This deed, marked [here add some letter or other mark for the purpose of identification] was this day produced before me [or us] and acknowledged by — therein named to be her act and deed, previous to which acknowledgment the said — was examined by me [or us] separately and apart from her husband touching her knowledge of the contents of the said deed and her consent thereto, and declared the same to be freely and voluntarily executed by her." And the same judge, master in Chancery, or commissioners, shall also sign a certificate of the taking of such acknowledgment, to be written or engrossed on a separate piece of parchment, which certificate, subject to any alteration which may from time to time be directed by the court of Common Pleas, shall be to the following effect, videlicet:—"These are to certify that on the — day of —, in the year one thousand, eight hundred and —, before me the undersigned Sir Nicholas Conyngham Tindal (*q*), Lord Chief Justice of the court of Common Pleas at Westminster [or before me Sir James Parke, knight, one of the justices of the court of King's Bench at Westminster, or before me the undersigned James William Farrar, one of the masters in ordinary of the court of Chancery, or before us A. B. and C. D., two of the perpetual commissioners appointed for the — for taking the acknowledgments of deeds by married women pursuant to an act passed in the — year of the reign of his Majesty King William the 4th, intituled an act [insert the title of the act] or before us the undersigned A. B. and C. D., two of the commissioners specially appointed pursuant to an act passed in the — year of the reign of his Majesty King William the 4th, intituled an act [insert the title of the act] for taking the acknowledgment of any deed by — the wife of —] appeared personally — the wife of — and produced a certain indenture marked [here add the mark] bearing date the — day of — and made between [insert the names of the parties] and acknowledged the same to be her act and deed, and I

(*q*) His lordship died 6 July, 1846.

[or we] do hereby certify that the said — was at the time of her acknowledging the said deed of full age and competent understanding, and that she was examined by me [or us] apart from her husband touching her knowledge of the contents of the said deed, and that she freely and voluntarily consented to the same.

And it is further enacted (*r*), that every such certificate of the taking of an acknowledgment by a married woman of any such deed, together with an affidavit by some person verifying the same, and the signature thereof by the party by whom the same shall purport to be signed, shall be lodged with some officer of the court of Common Pleas at Westminster, to be appointed as by the act is mentioned, and such officer shall examine the certificate, and see that it is duly signed either by some judge or master in Chancery or by two commissioners appointed pursuant to the act, and duly verified by affidavit, and shall also see that it contains such statement of particulars as to the consent of the married woman as shall from time to time be required in that behalf; and that if all the requisites in the act in regard to the certificate shall have been complied with, then such officer shall cause the said certificate and the affidavit to be filed of record in the said court of Common Pleas.

And further (*s*), that when the certificate of the acknowledgment of a deed by a married woman shall be filed of record, the deed so acknowledged shall, so far as regards the disposition, release, surrender, or extinguishment, thereby made by any married woman whose acknowledgment shall be so certified concerning any lands comprised in such deed, take effect from the time of its being acknowledged; and the subsequent filing of such certificate shall have relation to such acknowledgment.

And further (*t*), that the officer of the court of Common Pleas with whom such certificates shall be lodged, shall make and keep an index of the same, and such index shall contain

(*r*) Sect. 35.(*s*) Sect. 36.(*t*) Sect. 37.

the names of the married women and their husbands alphabetically arranged, and the dates of such certificates, and of the deeds to which the same shall respectively relate, and such other particulars as shall be found convenient, and every such certificate shall be entered in the index as soon as may be after such certificate shall have been filed.

And further (*u*), that after the filing of any such certificate, the officer with whom the certificate shall be lodged shall at any time deliver a copy, signed by him, of any such certificate to any person applying for such copy, and every such copy shall be received as evidence of the acknowledgment of the deed to which such certificate shall refer.

And it is further enacted (*v*), that if a husband shall, in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause, be incapable of executing a deed, or of making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by the act, or otherwise, and all acts, deeds, or surrenders, to be done, executed, or made by the wife in pursuance of such order, in regard to lands of any tenure, shall be done, executed, or made by her in the same manner as if she were a feme sole, and when done, executed, or made by her, shall, (but without prejudice to the rights of the husband as then existing independently of the act,) be as good and valid as they would have been if the husband had concurred; provided always that the present clause shall not

(*u*) Sect. 33.

(*v*) Sect. 91.

extend to the case of a married woman where under the act the lord high chancellor, lord keeper, or lords commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, or his Majesty's court of Chancery, shall be the protector of a settlement in lieu of her husband.

Thus it appears, 1st, that, by virtue of this act, leases may be made by a married woman, being tenant in fee, for life, or years (*x*), for any term consistent with her estate, as if she were a feme sole, provided the deed be sanctioned by the concurrence of the husband, and acknowledged by her on a separate examination; 2ndly, that leases incapable of effect under this act may still be valid under the enabling statute of Henry the 8th, on compliance with the conditions there enumerated; and, 3rdly, that, in the event of the provisions of both these acts being disregarded, the principles of the common law must be the test of the validity of leases made during coverture by the husband, or the husband and wife, of the wife's freehold lands.

The law relative to the renewal of leases where a feme covert is the reversioner, and to leases under powers granted to a feme covert, will be found in the chapters which respectively treat of Renewals (*y*), and Leases under powers (*z*).

v.—*Mortgagor and Mortgagee.*

We may now consider the effect of a lease, 1st, when granted by a mortgagor before the mortgage; 2ndly, when granted by a mortgagor alone after the mortgage; 3rdly, when granted by the mortgagee alone; and, 4thly, when granted by the mortgagee and mortgagor together.

1st, A tenant under a lease made prior to a mortgage can-

(*x*) As to leases by married women Chap. VII.
being tenants in tail, see ante, p. 87. (*z*) Post, Section IV. of this Chapter.
(*y*) See post, Part the Fourth,

not be turned out of possession by the mortgagee, otherwise than by virtue of the proviso for re-entry on non-payment of rent, or non-performance of covenants, the mortgagee, as assignee of the reversion, having no other rights than those exercisable by the mortgagor (*a*). But, to secure to himself the benefit of the rent and covenants, the mortgagee should give the lessee notice of the mortgage, and require payment of the rent; and he is entitled as well to rent which has fallen due since the mortgage and remains unpaid to the mortgagor, as to rent accruing due after the notice (*b*). Until notice, the lessee is justified in paying his rent to the mortgagor (*c*).

2ndly, As to leases granted by the mortgagor alone after the mortgage.

Whether the estate of a mortgagor in possession be an estate at will (*d*), at sufferance (*e*), or of a peculiar nature, constituting him the receiver, agent, or bailiff, of the mortgagee (*f*), or his tenant or trespasser at election (*g*), it is unnecessary in this place to inquire; for, independently of that consideration, it is settled, that the mortgagor has no power, expressed or implied, to make leases otherwise than subject to every circumstance of the mortgage (*h*); and, con-

(*a*) *Moss v. Gallimore*, 1 Dougl. 279. *Birch v. Wright*, 1 Term Rep. 378. *Rogers v. Humphreys*, 4 Adol. & Ell. 299; S. C. 1 Har. & Wol. 625. *Burrows v. Gradin*, 1 Dowl. & Lownd. 213.

(*b*) *Ibid.* 4 Anne, c. 16. s. 10. *Pope v. Biggs*, 9 Barn. & Cres. 245; S. C. 4 Man. & Ry. 193. Ex parte Hankey, *Mre Brindley*, 1 Mont. & Macar. 247.

(*c*) *Ibid.*

(*d*) *Smartle v. Williams*, 1 Salk. 245; S. C. 3 Lev. 387; Holt, 478; S. C., nom. *Smart v. Williams*, Comb. 247. *Ponesley, Pouseley, or Powsley, v. Blackman, or Blakeman*, J. Bridgm. 12; S. C. Cro. Jac. 659; Palm. 201; Bendl. 103; 2 Rol. 284. *Keech dem. Warne v. Hall*, 1 Dougl. 21-2. *Moss v. Gallimore*, 1 Dougl. 282-3.

(*e*) *Thunder dem. Weaver v. Belcher*, 3 East, 449. *Partridge v. Bere*, 5 Barn. & Ald. 604; S. C. 1 Dow. & Ry. 272. *Doe dem. Roby v. Maisey*, 8 Barn. & Cres. 767. *Pope v. Biggs*, 9 Barn. & Cres. 245. 253; S. C. 4 Man. & Ry. 193.

(*f*) *Birch v. Wright*, 1 Term Rep. 383. *Pope v. Biggs*, 9 Barn. & Cres. 258; S. C. 4 Man. & Ry. 193. *Wadilove v. Barnett*, 2 Bing. N. C. 538. 544. *Doe dem. Jones v. Williams*, 5 Adol. & Ell. 291. 297; S. C. 6 Nev. & Man. 816.

(*g*) *Doe dem. Roby v. Maisey*, sup. *Doe dem. Higginbotham v. Barton*, 11 Adol. & Ell. 307. 314; S. C. 3 Per. & Dav. 194.

(*h*) *Keech dem. Warne v. Hall*, 1 Dougl. 21. *Brown v. Storey*, 1 Scott's N. R. 9; S. C. 1 Man. & Gra. 117.

sequently, though a lease made by the mortgagor alone after the mortgage may be binding by estoppel (*i*) on him, and all persons afterwards claiming under him; yet the tenant under such a lease may, as a general rule, be ejected by the mortgagee without a notice to quit; for he cannot be in a better condition than the mortgagor himself, who is subject to eviction at the mortgagee's caprice without previous warning (*k*). He will, however, be protected in paying rent to the mortgagor until he receive notice from the mortgagee to pay it to him (*l*).

Where a party mortgaged his estate, and afterwards made a second mortgage, whereby he assigned all his right and interest in the premises both at law and in equity, having leased them to another in the interval, it was held that the lessee might avail himself of such second mortgage as a defence to an action of ejectment by the mortgagor, without showing that any interest was in arrear, or that the mortgagee had made any claim on him; for in doing so, he did not set up anything adverse to his landlord's right to grant the lease, but merely showed that he had subsequently parted with his title (*m*).

There has been much discussion, of late, as to the effect of notice of the mortgage given by the mortgagee to the party in possession as tenant to the mortgagor after the mortgage, accompanied with a demand of rent. It originated in some remarks which fell from the court in the case of *Pope v. Biggs* (*n*), where it was held, that notice by a mortgagee to a tenant of the mortgage, the tenancy having commenced

(*i*) *Omelaughland v. Hood*, 1 Rol. Ab. 874. pl. 10. 876. pl. 5. *Webb v. Austin*, 8 Scott's N. R. 419; S. C. 7 Man. & Gra. 701; Law Jour. N. S. vol. 13, p. 203, C. P. As to leases by estoppel, see ante, p. 52.

(*k*) See the cases, sup., and *Doe dem. Fisher v. Giles*, 5 Bing. 421; S. C. 2 Mo. & Pa. 749. *Doe dem. Hughes v. Bucknell*, 8 Car. & Pa. 566. *Brown v. Storey*, 1 Scott's N. R. 9; S. C. 1 Man. & Gra. 117. *Rogers v. Hum-*

phreys, 4 Adol. & Ell. 299; S. C. 1 Har. & Wol. 625.

(*l*) *Pope v. Biggs*, 9 Barn. & Cres. 245. 251; S. C. 4 Man. & Ry. 193.

(*m*) *Doe dem. Marriott v. Edwards*, 5 Barn. & Adol. 1065; S. C. 3 Nev. & Man. 193.

(*n*) *Pope v. Biggs*, sup. See also *Lysaght v. Callinan*, Hayes, 141. 151, and *Waddilove v. Barnett*, 2 Bing. N C 538; S. C. 2 Scott, 763.

subsequently to the mortgage, to pay the rent to him (the mortgagee) in discharge of his interest, with an intimation that, in default, he would pursue such remedies as were allowed by law for recovering the same, and payment accordingly, were a good defence to an action by the assignees of the mortgagor, who became bankrupt, against the tenant for use and occupation. It appeared that there was an arrear of rent, fallen due since the mortgage, when the notice was delivered, and that other rent subsequently became due, and it was contended by the plaintiff, that, assuming the defendant to be justified in paying to the mortgagee the rent which became due after the notice, he was, at all events, liable to pay to the mortgagor the rent which had previously accrued due. The court, however, determined otherwise; and Bayley, J., in delivering his judgment, said, "I have no doubt that, in point of law, a tenant who comes into possession under a demise from a mortgagor after a mortgage executed by him may consider the mortgagor his landlord so long as the mortgagee allows the mortgagor to continue in possession and receive the rents; and that payment of the rents by the tenant to the mortgagor, without any notice of the mortgage, is a valid payment. But the mortgagee by giving notice of the mortgage to the tenant, may thereby make him his tenant, and entitle himself to receive the rents."—"Here the mortgagee, by giving notice of the mortgage to the tenants, has put an end to the right of the mortgagor to receive the rents. At common law, the attornment of the tenant would have been necessary to entitle the mortgagee to the rents; but the effect of the statute 4 Anne, c. 16. ss. 9, 10, is to place a tenant, as soon as he has notice of the mortgage deed, in the same situation as if he had attorned to the mortgagee, with this exception, that he is not to be prejudiced by any act done by him as holding under the grantor, until he has had notice of the mortgage deed. That being so, as the attornment at common law would have related back to the time of the grant, it follows that all the rents due from the tenant, not actually paid over to the mortgagor, belong of

right to the mortgagee." So, Littledale, J., after observing that the mortgagor had no right to do anything without the consent of the mortgagee, and that the latter, although he might suffer the mortgagor to receive the rents for a time, might give notice to the several tenants not to pay them to the mortgagor, and thereby determine the authority of the latter to receive them, and that any tenant who paid rent to him after that notice would do so at his peril, proceeded thus: "It is said that this may be true as to future rents; but that it is not so as to by-gone rents. The same principle, however, applies to both. The mortgagee cannot, indeed, distrain or maintain any action for the by-gone rents which accrued due before he gave notice to the tenants, because, before that time, there was no privity between him and the tenants. But the notice, by force of statute 4 Anne, c. 16, operates as an attornment of the tenants, and when they attorn they become tenants to the mortgagee, and at common law that attornment would have related back to the grant, so as to entitle the mortgagee to all the rents from the time when the deed was executed. A new tenancy is then created as between mortgagor and mortgagee, and the latter becomes entitled to all the by-gone rents."—"It seems to me, therefore, that the mortgagees, by giving notice of the mortgage to the tenants, entitled themselves to receive the by-gone as well as the future rents." Indeed, throughout the whole judgment of the court it appears to have been assumed that the former tenancy continued, the mortgagee standing in the place of the mortgagor.

But this doctrine has been frequently impugned, and cannot now be relied on. The language of Lord Denman in *Rogers v. Humphreys* (o), is wholly opposed to it. If (said his Lordship) there be a lease, and such lease is prior to the mortgage, the mortgagee has the same rights against the lessee, and those claiming under him, that the mortgagor had, and no other than he had, and his remedy must be on the

(o) *Rogers v. Humphreys*, 4 Adol. & Ell. 299. 313; S. C. 1 Har. & Wol. 625.

lease as assignee of the reversion, as long as the lease is in existence, and the tenant acknowledges his title; but if the lease be subsequent to the mortgage, then the mortgagee may treat the lessee, and all those who may be in possession, as wrong-doers, and may bring an ejectment, but he cannot distrain, or bring any action for the rent they have contracted to pay, as there is no relation of landlord and tenant between them, unless they choose to pay the rent to the mortgagee, and he accepts it: in that case there is a relation of landlord and tenant created between the mortgagee and the tenants, and the remedy of the mortgagee will depend upon the particular circumstances of each case: no notice is necessary to be given by the mortgagee that he means to proceed against such tenants where they come in subsequent to the mortgage, because in such case their title is wrongful as against the mortgagee; but there may be cases where, in consequence of the conduct of the mortgagee, notice may become necessary.

To the same effect is *Partington v. Woodcock* (*p*), where an insolvent debtor being in possession of certain premises, demised them to another for years, who, on being sued by the insolvent for rent, pleaded, that, after the plaintiff's discharge under the insolvent debtor's act, and after the making of the demise, (the plaintiff having been authorised and permitted by the assignee to remain in possession, and make the demise,) and before the rent became due, the defendant received from the assignee a notice and requisition to pay the rent under the demise to him, and that, in default, legal proceedings would be taken by the assignee to recover; and it was held that the plea was bad, the assignee not being entitled under the old demise, and no new tenancy between the lessee and assignee having been shown. And on *Pope v. Biggs* being cited, Patteson, J., said, that he never could see how notice could make the mortgagor's tenant tenant to the mortgagee at the former rent; that there might, indeed,

(*p*) *Partington v. Woodcock*, 6 Adol. & Ell, 690; S. C. 5 Nev. & Man. 672; 1 Har. & Wol. 262.

be a new tenancy created at the old rent, where fresh notice was given, and the rent paid accordingly; and Littledale, J., whose opinion in *Pope v. Biggs* has already been noticed (*g*), also observed, that if the lease were made subsequently to the mortgage, he saw no remedy the mortgagee could have against the tenant, on non-payment of the rent, but to bring ejectment.

So, in a case at *nisi prius* (*r*), before Patteson, J., it was decided, that a mortgagee, by consenting to take as his tenant a party claiming under a lease posterior to the mortgage, instead of turning him out of possession, did not establish the lease; but made the tenant his lessee from year to year only.

To the same effect also is *Evans v. Elliot* (*s*), where it was held that a mortgagee, by giving notice to a tenant holding under a lease made by the mortgagor only after the execution of the mortgage, to pay his rent to him (the mortgagee), and not to the mortgagor, did not entitle himself to distrain as for rent accruing under the lease, such notice not constituting the relation of landlord and tenant between the mortgagee and lessee. In this case the naked point was presented to the court, and they were unanimously of opinion that, by the mere fact of notice that the mortgage money remained unpaid, the mortgagee could not forthwith cause the tenant to hold of him. *Pope v. Biggs* (*t*), therefore, so far as it advances a different doctrine, is overruled.

And it has also been held very lately, that payment of rent by a mortgagor's tenant to the mortgagee, under an authority from the mortgagor, will not create the relation of landlord and tenant between the tenant and the mortgagee (*u*).

Hence also it would seem that a lease made by a mortgagor

(*g*) Sup. p. 167.

(*r*) Doe dem. Hughes v. Bucknell, 8 Car. & Pa. 566.

(*s*) Evans v. Elliot, 9 Adol. & Ell. 342; S. C. 1 Per. & Dav. 256. 1 Willm. Wol. & Hodg. 744. And see Doe dem. Higginbotham v. Barton, 11

Adol. & Ell. 307. Johnson v. Jones, 9

Adol. & Ell. 809; S. C. 1 Per. & Dav. 651; and Burrowes v. Gradin, 1 Dowl. & Lownd. 213.

(*t*) Pope v. Biggs, sup. p. 165.

(*u*) Wheeler v. Branscombe, 5 Q. B. 373; S. C. 1 Dav. & Meriv. 406.

subsequently to the mortgage is void as against the mortgagee (*x*). But in *Evans v. Elliot* (*y*), adverting to an argument that the mortgagee might always treat both the mortgagor, and all who claimed under him, as trespassers, and that, for that reason, the mortgagor's lessee could not become the tenant of the mortgagee under the old lease, Lord Denman said, that, though he believed that his learned brothers were disposed to assent to the proposition, he wished to guard himself against being understood to adopt it as universal; for he considered that a mortgagee might so bind himself by his own conduct as to be precluded from treating the mortgagor's lessee as a trespasser; and declared himself by no means prepared to admit that a jury would not be warranted in inferring a recognition of the tenant's right to hold from the mere circumstance of the mortgagee's knowingly permitting the mortgagor to continue the apparent owner of the premises, as before the mortgage, and to lease them out, exactly as if his property in them continued.

There is no doubt, however, that if the mortgagee require the rent to be paid to him, and it be paid accordingly, the relation of landlord and tenant may arise between the parties (*z*); or, at all events, the mortgagee may be entitled to sue the tenant for use and occupation (*a*). And where the attorney of a mortgagee, who was also attorney of the mortgagor, applied to the tenant in possession under the mortgagor for payment of his rent, in order to satisfy the interest on the mortgage, with a threat of distress in case of non-payment, it was held that the mortgagee could not maintain an ejectment against the tenant as a trespasser, laying the demise at

(*x*) See also *Keech v. Hall*, 1 Dougl. 21. *Birch v. Wright*, 1 Term Rep. 373. 339. *Thunder dem. Weaver v. Belcher*, 3 East, 449. *Ex parte Wills*, 2 Cox, 233.

(*y*) *Evans v. Elliot*, sup.

(*z*) *Pousley, Pousley, or Powseley, v. Blackman, or Blakeman*, J. Bridgm. 12; S. C. Cro. Jac. 659; Bendl. 103;

2 Rol. 234; Palm. 201. Cro. Car. 304. Skin. 424. *Doe dem. Higginbotham v. Barton*, 11 Adol. & Ell. 307; S. C. 3 Per. & Dav. 194. *Rogers v. Humphreys*, 4 Adol. & Ell. 299; S. C. 1 Har. & Wol. 625.

(*a*) *Doe dem. Higginbotham v. Barton*, sup. *Rawson v. Eicke*, 7 Adol. & Ell. 451; S. C. 2 Nev. & Per. 423.

a period anterior to the application (*b*); though the mere receipt by the mortgagee from the mortgagor of interest on the mortgage will not preclude the mortgagee from ejecting the mortgagor's tenant, declaring on a demise prior to the receipt (*c*). In the case last cited, Littledale, J., hinted a doubt as to the propriety of the judgment in *Doe dem. Whitaker v. Hales* (*d*); but Lord Denman subsequently declared (*e*) that, notwithstanding that doubt, the case appeared to him to be well decided.

If, after notice and demand, the tenant continue in possession, a jury may fairly infer a new tenancy from year to year between him and the mortgagee, at the old rent (*f*). But if the judge, not being required at the trial to leave it to the jury to say whether the tenant assented to the new tenancy, omit to do so, the omission cannot support a motion for a new trial on the ground of misdirection (*g*).

After such notice and demand, the tenant is justified in paying to the mortgagee as well such rent as may have fallen due since the mortgage, and remain unpaid to the mortgagor, as that which may thereafter become due. This was decided in the case of *Pope v. Biggs* (*h*), the court considering the mortgagee's demand to be equivalent to an eviction of the tenant by title paramount, which, of course, would be an answer to the mortgagor's claim (*i*). So, in *Doe v. Barton* (*k*), Lord Denman said that the mortgagee was entitled to the profits of the land, and that the tenant was right in paying him those profits, whether strictly called rent or not. That, as he might eject the lessee, and afterwards let to him, it seemed absurd to require him to go through the form of an ejectment in order to put the lessee

(*b*) *Doe dem. Whitaker v. Hales*, 7 Bing. 322; S. C. 5 Mo. & Pa. 132.

(*c*) *Doe dem. Rogers v. Cadwallader*, 2 Barn. & Adol. 473.

(*d*) *Doe dem. Whitaker v. Hales*, sup.

(*e*) *Evans v. Elliot*, 9 Adol. & Ell. 342, 355; S. C. 1 Per. & Dav. 256; 1 Willm. Wol. & Hodg. 744.

(*f*) *Brown v. Storey*, 1 Scott's N. R. 9; S. C. 1 Man. & Gra. 117. *Doe dem. Hughes v. Bucknell*, 8 Car. & Pa. 566.

(*g*) *Brown v. Storey*, sup.

(*h*) *Pope v. Biggs*, sup. p. 165.

(*i*) *Ibid.*

(*k*) *Doe dem. Higginbotham v. Barton*, sup.

into the very position in which he would stand by paying his rent to the mortgagee (*l*).

Though the tenant cannot dispute his landlord's (the mortgagor's) title to demise, he may show that such title was defeasible, and that it has been defeated (*m*).

In the case of *Johnson v. Jones* (*n*), the plaintiff in replevin, to an avowry for rent due in respect of premises held by the plaintiff as tenant to the defendant, pleaded, that, before the defendant had anything in the premises, one Ann Griffith, being seised in fee, mortgaged them in fee to J. Clement; that default was made in payment; that the equity of redemption descended to David Griffith, who leased them to the defendant for twenty-one years, who made the demise to the plaintiff mentioned in the avowry; that after the rent became due from the plaintiff as tenant to the defendant, the heir of the mortgagee, to whom the premises had descended, demanded payment thereof from the plaintiff, and threatened in case of non-payment to put the law in force, wherefore the plaintiff did then necessarily and unavoidably pay the said mortgagee the said sum of 14*l.* so in arrear, "and so the plaintiff says that no part of the said sum of 14*l.* of the said rent was, or is, in arrear, as in the avowry," &c. This plea was demurred to, on the ground that it attempted to deny the title of the defendant; that it showed no power in the mortgagee to compel payment, and that it amounted to *riens in arriere*. But it was held that the plea was not one of *nil habuit*, nor of eviction, but of payment; that the plaintiff did not deny his holding as tenant to the defendant; but showed that the lease was made subject to a prior charge, namely the mortgage, which he was compelled to pay; and that the facts stated in the plea showed an authority in law justifying payment to a third party.

It is to be observed that these cases are distinguishable

(*l*) See also similar remarks made by Parke, J., in *Pope v. Biggs*, 9 Barn. & Cres. 250-1; S. C. 4 Man. & Ry. 193.

(*m*) *Pope v. Biggs*, sup.

(*n*) *Johnson v. Jones*, 9 Adol. & Ell. 809; S. C. 1 Per. & Dav. 651. And see *Sapsford v. Fletcher*, 4 Term Rep. 511. *Taylor v. Zamira*, 6 Taunt. 524.

from *Alchorne v. Gomme* (o), where the tenant had not only voluntarily attorned to the mortgagee, but expressly denied the title of his lessor, (the mortgagor).

3rdly. As to leases by the mortgagee alone.

Where a mortgage has become absolute, the mortgagee, being the unconditional legal owner of the premises, may alone grant leases for any term, regard being had to the quantity of estate conferred by the mortgage, which cannot be impeached *at law* by the mortgagor; but, before foreclosure of the equity of redemption, a mortgagee cannot make a lease of the property in mortgage, which will be binding *in equity* upon the mortgagor after redemption; unless it be necessary to avoid an apparent loss, in which case equity will not permit the lessee to be disturbed (p).

4thly. In order, therefore, to insure the permanency of a lease of lands in mortgage, the concurrence of both mortgagee and mortgagor must be obtained. The former, to pass the legal estate, should "demise and lease," and the latter, to affect his estate, should "grant, demise, and lease, and also ratify and confirm," care being taken to avoid the unskilful error of making the mortgagee the only demising party, with the consent and approbation of the mortgagor.

When granted by mortgagee and mortgagor, the lease operates, during the continuance of the mortgage, as the demise of the former, and the confirmation of the latter; but after the mortgage is paid off, as the demise of the latter, and confirmation of the former (q).

Where a mortgagor and his mortgagee for a term of years concurred in a deed by which the former demised and leased, and the latter ratified and confirmed, the premises unto a third party for the residue of the term, at a certain yearly rent, reserved to the mortgagor, his executors, administrators, or assigns, and which the lessee covenanted to pay to the

(o) *Alchorne v. Gomme*, 2 Bing. 54;
S. C. 9 J. B. Mo. 130.

(p) *Hungerford v. Clay*, 9 Mod. 1;
S. C. 2 Eq. Ca. Ab. 610.

(q) *Doe dem. Barney v. Adams*, 2
Crompt. & Jerv. 232; S. C. 2 Tyrwh.

239.

mortgagor, his executors, administrators, and assigns; but it was declared that nothing in the deed contained should tend to disqualify, abridge, lessen, alter, defeat, impeach, annul, or determine, the estate or interest of the mortgagee in the premises, which it was also declared should remain a security for his principal and interest, it was held that the mortgagee, and not the mortgagor, was entitled to the rent reserved by the lease; though the lessee was entitled to his term exempt from the mortgage (*r*).

A mortgagor cannot enforce a specific performance of a contract to take a lease, without first redeeming the mortgage, or obtaining the mortgagee's concurrence in the lease (*s*); though a party claiming under such a contract cannot compel the mortgagor to pay off the mortgage to give effect to the lease (*t*).

But in a very recent case (*u*), where a mortgagor contracted to sell a shop and dwelling house, stated in the particulars of sale to be held by a tenant under a lease at a certain yearly rent, the lease having in fact been granted by him after the mortgage, without the concurrence of the mortgagee, it was held, that, as the mortgagee was willing to concur in any conveyance, the mortgagor could make a good title, as by a re-conveyance by the mortgagee to the mortgagor, that which before was only a lease by estoppel, would be converted into a lease in interest.

It is a common practice to reserve the rent to the mortgagee during such part of the term as the mortgage shall be outstanding; and, after it shall have been discharged, to the mortgagor for the remainder of the term, if any; but, as rent reserved to a mortgagor would be but an annual sum in gross, it is better to reserve it generally during the term, leaving the law to carry it to the person legally entitled (*x*).

Where the mortgagee and mortgagor concur in the grant,

(*r*) *Edward v. Jones*, 1 Col. 247.

(*s*) *Costigan v. Hastler*, 2 Scho. & Lef. 160.

(*t*) *Ibid.*

(*u*) *Webb v. Austin*, 3 Scott's N. R. 419; S. C. 7 Man. & Gra. 701; Law Jour. N. S. vol. 13, p. 203, C. P.

(*x*) *Whitlock's case*, 8 Co. 69, b. 71, a.

the covenants on the lessor's part should be entered into with the mortgagee, with a view to their running with the land. If entered into with the mortgagor, they are merely covenants in gross, and of no value at law to an assignee of the mortgage (*y*).

In an action lately brought by a lessee on an implied covenant arising out of a demise (*z*), against a mortgagee and his mortgagor, who, together with the trustee of a term, were demising parties in the lease, the court held that the plaintiff was bound to prove a joint demise by the two defendants, and that, as one of the defendants was entitled to an equity of redemption only, and, therefore, incapable of making a legal demise, a covenant by him could not be implied (*a*).

A demise by the mortgagee to the mortgagor will not suspend the condition; for the payment of the mortgage-money does not arise from the profits of the land; and the condition is collateral (*b*).

In a late case (*c*), where a mortgage was made subject to redemption on re-payment of the money and interest on the 5th of June, 1833, and it was agreed that the mortgagee should not be entitled to call it in before the 5th of December, 1840, if the interest were regularly paid; with a proviso that it should be lawful for the mortgagor quietly to hold and enjoy the premises, and receive the rents thereof, till default in payment of the principal money, or the interest thereof, it was held that the proviso operated as a re-demise to the mortgagor till the 5th of Dec. 1840, provided the interest in the meantime were regularly paid.

(*y*) *Webb v. Russell*, 3 Term Rep. 393. *Stokes v. Russell*, 3 Term Rep. 679. *Russell v. Stokes*, in error, Exch. Chamb. 1 H. Blac. 562.

(*z*) The late act of 8 & 9 Vict. c. 106. s. 4, which deprived the word *grant* of its operation as a covenant in law, did not extend to the word *demise*.

(*a*) *Smith v. Pocklington*, 1 Crompt. & Jerv. 445; S. C. 1 Tyrw. 309.

(*b*) *Jenk. Cent.* 254, case 46. *Wilkinson v. Hall*, 3 Bing. N. C. 508; S. C. 4 Scott, 301.

(*c*) *Wilkinson v. Hall*, 3 Bing. N. C. 508; S. C. 4 Scott, 301.

SECTION IV.—WITH REFERENCE TO OFFICE.

1.—*Corporations in general.*

Before entering upon an examination of the powers of leasing enjoyed by particular corporations, it will be convenient to offer some remarks respecting corporations in general, and as a few previous words explanatory of the different kinds of corporations may tend to assist the student in this intricate and important branch of our subject, no apology will be offered for their introduction in this place.

Corporations are either spiritual or temporal, according to the object of their institution. Spiritual or (as they are also denominated) ecclesiastical corporations are such as are devoted to the service and interest of the church, the component members being of the ecclesiastical order (*d*).

Temporal (termed also lay) corporations may be subdivided into two classes; eleemosynary, and civil. The former are constituted for the perpetual distribution of the free alms or bounty of the founder; such, for example, are hospitals for the maintenance and relief of the poor, sick, and impotent; and they retain their temporal character, though composed of ecclesiastical persons, and partaking in some things of the nature, privileges, and restrictions, of ecclesiastical bodies (*e*).

Civil corporations are established for a variety of secular purposes. The Queen, for instance, is made a corporation to prevent in general the possibility of an interregnum, or vacancy of the throne, and to preserve the possessions of the crown entire. Other civil corporations have at various times been erected for the good government of a town or particular district, under the name of mayor and commonalty, bailiff and burgesses, and other similar denominations (*f*); and it

(*d*) 1 Bla. Com. 470.

(*e*) 1 Bla. Com. 471.

(*f*) 1 Bla. Com. 470. By the late

Municipal Corporations Act, 5 & 6 W. 4. c. 76, as we shall see hereafter, the corporate bodies enumerated in

appears to be now fully established, whatever doubts may formerly have existed on the subject, that the universities of Oxford and Cambridge rank as civil and not as eleemosynary bodies (*g*).

All corporations are either sole or aggregate (*h*). The former consists of one person only and his successors. In this sense the Queen is a sole corporation. So is an archbishop, a bishop, an archdeacon, a parson, and a vicar; so are some deans and prebendaries (*i*), distinct from their several chapters (*k*). The latter consist of many persons united together in one society; such as the dean and chapter of a cathedral church, the head and fellows of a college, and the mayor, aldermen, and burgesses of a city (*l*).

A corporation cannot make a valid legal demise except by deed (*m*), sealed with their common seal (*n*). Therefore, *Sec. Com. v. Mena*
4 R 4 Ex 162
 where certain persons were constituted a corporation for building a bridge, &c., with power to use a common seal, and five of them, describing themselves as five of the members of a committee appointed for managing and carrying on the affairs of the company, demised the toll-house, tolls, &c., under their own seals, but not that of the corporation, it was held that the instrument could not be supported (*o*). On the other hand, where a lease was made by a corporation, (the master and governors of an hospital,) and sealed with their common seal, it was held that the survivors, though indivi-

schedules (A) and (B) to that act are now denominated "The mayor, aldermen, and burgesses."

(*g*) *Parkinson's case*, Carth. 93; S. C. 3 Mod. 265. *Skin*, 494. 1 Ld. Raym. 6. *Rex v. Vice-Chancellor &c. of Cambridge*, 3 Burr. 1656.

(*h*) 1 Bla. Com. 469.

(*i*) The members of chapter, except the dean, are now styled "Canons"; 3 & 4 Vict. c. 113. s. 1.

(*k*) 1 Bla. Com. 469.

(*l*) *Ibid.* -

(*m*) *Dean and Chapter of Rochester v. Pierce*, 1 Campb. 466. *Furley dem. Mayor &c. of Canterbury v. Wood*,

1 Esp. 198. *Rex v. Inhabitants of Chipping Norton*, 5 East, 239. 242. *Southwark Bridge Company v. Sills*, 2 Car. & Pa. 371.

(*n*) *Smith v. Barrett*, 1 Sid. 162. *Patrick v. Balls*, Carth. 390; S. C., nom. *Partridge v. Ball*, 1 Ld. Raym. 136. *Wood v. Tate*, 2 New Rep. 247. *Winne v. Bampton*, 3 Atk. 475. *Furley dem. Mayor of Canterbury v. Wood*, 1 Esp. 198. *Carter v. The Dean and Chapter of Ely*, 7 Sim. 211. 227. *Bird v. Higginson*, 6 Adol. & Ell. 824-7; S. C. 1 Har. & Wol. 61.

(*o*) *Rex v. The Inhabitants of North Duffield*, 3 Mau. & Selw. 247.

dually named as parties to the deed, could not maintain an action of covenant against the lessee (*p*).

If a plaintiff in ejectment declare on a demise by a corporation, without setting forth that it was by deed under their common seal, the error will be cured by verdict (*q*).

A corporation affixes its seal through the medium of a party deputed to perform that office (*r*); the instrument, when sealed, needs, in general, no delivery (*s*); but if a corporation appoint an attorney to enter and make delivery of a lease upon the land, the lease is not complete until delivery, although the corporation may have put their seal to it (*t*).

Though a corporation lease cannot be supported unless it be under their common seal, the lessee, by his entry and enjoyment, where corporeal hereditaments are the subject of demise, may become a tenant from year to year (*u*); and the corporation may distrain for the rent (*x*). And, whether the subject be a corporeal (*y*) or an incorporeal (*z*) hereditament, they may maintain an action either of debt (*a*) or assumpsit (*b*) for use and occupation; for such an action does not necessarily suppose any demise; it is enough that the defendant

(*p*) *Cooch v. Goodman*, 2 Q. B. 580; S. C. 2 Gale & Dav. 159.

(*q*) *Partridge v. Ball*, 1 Ld. Raym. 136; S. C., nom. *Patrick v. Balls*, Carth. 390. *Bird v. Higginson*, 6 Adol. & Ell. 824-7; S. C. 1 Har. & Wol. 61.

(*r*) *Doe dem. The Bank of England v. Chambers*, 4 Adol. & Ell. 410; S. C. 6 Nev. & Man. 539; 1 Har. & Wol. 749.

(*s*) *Butler v. Fincher*, 1 Rol. 229. 231, per Coke; but see *cont.*, per Gawdy, 2 Leon. 98. Perk. s. 132. Rol. Ab. Faits, (I) pl. 4. 5.

(*t*) *Willis v. Jermin*, Cro. Eliz. 167; S. C. 2 Leon. 97.

(*u*) *Wood v. Tate*, 2 New Rep. 247. Vin. Ab. Corporation, (K) pl. 11. 41.

(*x*) *Ibid.*

(*y*) *Dean and Chapter of Rochester v. Pierce*, 1 Campb. 466. *Southwark Bridge Company v. Sills*, 2 Car. & Pa. 371. *Mayor and Burgesses of Staf-*

ford v. Till, 4 Bing. 75; S. C. 12 J. B. Mo. 260.

(*z*) *Mayor and Burgesses of Carmarthen v. Lewis*, 6 Car. & Pa. 608. See *Rex v. Inhabitants of Chipping Norton*, 5 East, 239. *Rex v. Inhabitants of North Duffield*, 3 Mau. & Selw. 247. *Mayor and Burgesses of Stafford v. Till*, *sup.*

(*a*) *Dean and Chapter of Rochester v. Pierce*, *sup.* *Beverley v. The Lincoln Gas Light and Coke Company*, 6 Adol. & Ell. 829. 838; S. C. 2 Nev. & Per. 283. 291. And see *Gibson v. Kirk*, 1 Q. B. 850; S. C. 1 Gale & Dav. 252.

(*b*) *Mayor and Burgesses of Carmarthen v. Lewis*, *sup.* *Southwark Bridge Company v. Sills*, *sup.* *Mayor and Burgesses of Stafford v. Till*, *sup.* *East London Water Works Company v. Bailey*, 12 J. B. Mo. 532. 536; S. C. 4 Bing. 283. 287.

use and occupy the premises by the permission of the plaintiff; and a corporation, as well as an individual, may, without deed, permit a person to use and occupy premises of which they are seised (*c*).

It is not necessary to prove the seal of a corporation in the same manner as the seal of an individual, by producing a witness who saw the seal affixed; though where an instrument having a seal affixed to it, purporting to be a corporate seal, is produced in evidence, it is necessary to prove it to be the seal of the corporation, if there be any doubt about it (*d*); otherwise, any instrument with a seal to it might be produced in court as an instrument sealed by the corporation (*e*).

If there be an attesting witness to the affixing of the seal, it is questionable whether he should not be called to prove the deed (*f*). In the case last cited, the seal of the bank of England was affixed to the parchment of an indenture of feoffment by a piece of paper, on which was written:—"Sealed by order of the court of directors of the governor and company of the bank of England, 12th Dec. 1833: John Knight, secretary;" and it was contended that Knight was an attesting witness, and ought to be called; but the court regarded the writing as a memorandum merely that the seal was impressed by order of the corporation, and not as an attestation.

In a case of ejectment at *nisi prius* (*g*), Lord Kenyon held that the common seal of the city of London proved itself.

In an ejectment by a corporation, it is never expected that their demise by deed to the nominal plaintiff should be proved (*h*).

Sir L. Shadwell, V. C., has declared it to be the clear law of the land, that eleemosynary and ecclesiastical corporations

(*c*) Dean and Chapter of Rochester *v.* Pierce, sup.

(*d*) See, however, the late act to facilitate the admission in evidence of certain official and other documents, 8 & 9 Vict. c. 113.

(*e*) Moies *v.* Thornton, 8 Term Rep.

303. 307; S. C. 3 Esp. 4.

(*f*) Doe dem. The Bank of England *v.* Chambers, sup.

(*g*) Doe dem. Woodmass *v.* Mason, 1 Esp. 53.

(*h*) Furley dem. Mayor &c. of Canterbury *v.* Wood, 1 Esp. 198.

are not bound by anything in the shape of an agreement regarding their lands, unless it be evidenced by a deed or writing with their corporate seal affixed to it (*i*). And his Honor, therefore, held, that an entry signed by the dean and five of the prebendaries (*k*) of Ely (who constituted a majority of the body) in their corporation books, of the terms of an arrangement to accept a party as their lessee, was not an agreement which would bind them (*l*).

But in an earlier case (*m*), Sir John Leach, V. C., said, that he was inclined to think that, if a regular corporate resolution passed for granting an interest in a part of the corporate property, and upon the faith of that resolution expenditure was incurred, both principle and authority would be found for compelling the corporation to make a legal grant in pursuance of that resolution. In this view Alderson, B., has since seemed to concur (*n*); and in a recent case (*o*), where the London and Birmingham Railway Company had contracted by their agent for the purchase of a piece of land, and had entered upon, and proceeded to construct their railway over it, Lord Cottenham, C., overruled an objection that, as the agent was not appointed under their corporate seal, the company were not bound by his acts. "It is not very easy," said his lordship, "to reconcile all the cases on the subject; but the case of the Mayor of Stafford *v.* Till (*p*) is very similar to the present, as to the circumstances of the parties to the contract; there the court of Common Pleas thought that the corporation were entitled to support an assumpsit for use and occupation against a tenant, who, though he did not hold of them by deed, had had actual

(*i*) *Carter v. Dean and Chapter of Ely*, 7 Sim. 211, 227.

(*k*) See ante, p. 177. n. (*i*).

(*l*) *Carter v. Dean and Chapter of Ely*, sup.

(*m*) *Marshall v. The Corporation of Queenborough*, 1 Sim. & Stu. 520.

(*n*) *Wilmot v. The Corporation of Coventry*, 1 Yo. & Col. Exch. 513. And see *Taylor v. Dulwich Hospital*,

1 P. Wms. 655; S. C. 2 Eq. Ca. Ab. 193, pl. 2. *Dean and Chapter of Ely v. Stewart*, 2 Atk. 44-5; S. C. Barnard. Ch. 170. *Winne v. Bampton*, 3 Atk. 473, 478.

(*o*) *The London and Birmingham Railway Company v. Winter*, 1 Cr. & Phil. 57.

(*p*) 4 Bing. 75; S. C. 12 J. B. Mo. 260.

enjoyment of their land. So here, the plaintiffs have not only been acting on the contract by entering into possession of the property, but have actually destroyed the property enjoyed by the defendant previously to the contract, by making their railway over it. If, therefore, it were necessary for the defendant to file a bill against these plaintiffs, I have no doubt but that they would be compelled specifically to perform the contract."

In the case of *Saunders v. The Dean and Chapter of Bristol* (*q*), the dean and chapter made a church lease for forty years, and the dean and most of the prebendaries were changed; the succeeding dean and chapter then brought an ejectment against the lessee, who filed his bill against them, and likewise against the former dean and chapter, praying that the present dean and chapter might make such lease as they could by law, and that the former dean and chapter might refund such part of the fine in proportion as a fine upon a lease for twenty-one years would have borne to a fine upon a lease for forty years. The Lord Chancellor said that the question relating to the merits of the cause was such a one as he never knew to be determined; and that the proper direction, therefore, to be given was, that the injunction should be continued to the hearing, on the plaintiffs consenting to deliver possession on the hearing, and to account as the court should direct.

A corporation sole, as a bishop or a parson, cannot, in his politic capacity, make a lease to himself in his individual capacity (*r*): nor can one member of a corporation aggregate make a lease of corporate lands to another member; thus a dean cannot make a lease to his chapter; nor can the chapter to the dean, for they are integral parts of the same corporation, and must concur in every corporate act (*s*). And, for the same reason, if a corporation consist of two bailiffs and burgesses, one of the bailiffs and the burgesses cannot, in

(*q*) *Saunders v. The Dean and Chapter of Bristol*, Barnard. Ch. 323.

303-4.

(*r*) *Salter v. Grosvenor*, 8 Mod.

(*s*) *Ibid.* And see *Starkey v. Birton*, Cro. Jac. 234.

their politic character, make a lease of their corporate estate to the other bailiff in his individual character (*t*). But there is no objection to a lease being made by the dean and chapter to one of the prebendaries, for a prebendary is not an integral part of the body politic (*u*).

If a lease be made professedly by a corporation, the court cannot judicially notice that no such corporation exists (*x*).

In framing leases by corporations care should be taken to state their title of incorporation correctly, as an omission or alteration in any material particular may prove a fatal objection. The municipal corporations mentioned in the schedules (A) and (B) to the act of 5 & 6 W. 4. c. 76, have now, as we have seen (*y*), one uniform style of "The Mayor, Aldermen, and Burgesses" of their respective boroughs; and very little attention will suffice to ensure accuracy; but, in earlier days, the avoidance at law of corporation leases on account of defective descriptions of their name of incorporation was of frequent occurrence. We may give a few examples, taken indiscriminately, and without regard to the kind of corporation. On reference, however, to the reports cited, it will be seen that attempts to subvert leases on this ground were received with marked disapprobation in courts of law; and as early as the time of King James the 1st lessees in such cases were relievable in equity (*z*).

Leases have been declared to be void,

Where the corporation was founded by the name of,	} and {	The lease was granted by the name of,
The Warden and Scholars Domûs sive Collegii Scholarium de Mer- ton in Universitate Oxoniæ (<i>a</i>).		Custos Domûs sive Collegii de Merton in Oxoniâ et Scholares ejusdem domûs (<i>a</i>).
The Guild of St. Nicholas and our Lady the Virgin Mary, &c. (<i>b</i>).		The Guild of our Lady the Virgin and St. Nicholas (<i>b</i>).

(*t*) Ibid.

(*u*) Ibid.

(*x*) *Cooch v. Goodman*, 2 Q. B. 580;
S. C. 2 Gale & Dav. 159.

(*y*) Ante, p. 176. n. (*f*).

(*z*) Cary, 44.

(*a*) *Fisher v. Boys*, cited 1 Leon.
162; 10 Co. 125, n.; Hob. 125. But
according to Moore's report of the
case, (Mo. 266) the variance was not
material.

(*b*) Cited 1 Leon. 162.

The Dean and Chapter Cathedral Eglise Sancti Peterburgensis, or Sancti Petri Burgen' (c).	The Dean and Chapter de le Cathe- dral Eglise de Peterborough (c).
Præpositi et Collegii regalis Col- legii beatæ Mariæ de Eaton juxta Windsor (d).	Præpositi et Sociorum Collegii re- galis de Eaton juxta Windsor (d).
Dean et Chapter del College de St. Mary de Eaton (e).	Dean et Chapter del College de Eaton (e).
The Master, Fellows, and Scholars of the blessed and undivided Trinity in the University of Cambridge (f).	The Master, Fellows, and Scholars of Trinity College in Cam- bridge (f).

But objections on the ground of misnomer were overruled,
Where the corporation was } and { The lease was granted by the
founded by the name of, } name of,

Decanus et Capital. Ecclesiæ Ca-
thedralis St. et individua Tri.
Carl. (g). Decanus Ecclesiæ Cathedralis S.
Trin. in Car. et totum Capit. de
Ecclesiæ prædict (g).

Masters and Governors and Com-
monalty of the Mystery of
Cooks (h). Master and Wardens of the Craft
and Mystery of Cooks (h).

Minister Dei, pauperis domûs de
Donnington (i). Thomas Letherland, Yeoman, Mi-
nister of the Almshouse of God
of Donnington, besides Newberry,
in the county of Berks, and the
Almsmen, confreres of the same
house (i).

Præpositus et Scholares Aulæ Re-
ginæ de Oxon (k). Præposit' Sociorum et Scholarium
Aulæ vel Collegii Reginæ in
Universitat' Oxon Rectoriæ Ec-
clesiæ de Charlton super Ote-
more Patroni (k).

(c) Eaton College case, 1 And. 23.
pl. 47; S. C. Benl. 45; but according
to Mo. 13, 14, the objection was not
considered fatal to the lease. And see
1 Leon. 159, *Argo*?

(d) Eaton College case, 2 Dy. 150, a.
pl. (85); S. C. Jenk. Cent. 214, case 54.

(e) Eaton College case, 1 And. 23.
pl. 47; S. C. Mo. 13; Benl. 45.

(f) Jenk. Cent. 233, case 6.

(g) Cited, 1 Leon. 159. 161. 163, for

the word "Trinity" imports *St. et
individ.*; S. C. cited, 10 Co. 122, b.;
Jenk. Cent. 235, case 10.

(h) Croft v. Howell, Plowd. 537;
cited, 1 Leon. 159.

(i) Pitt v. James, Hob. 121; S. C.
Mo. 865. Sherborne v. Lewis, Mo.
539, semb. S. C. in an earlier stage;
S. C. Goulds. 120. pl. 7.

(k) Ayray's case, 11 Co. 18, b.

The Dean and Chapter of the Cathedral Church of Christ, &c. Oxford of the foundation of King Henry the 8th (*l*).

The Master, Brothers, and Sisters, of the Hospital of the blessed Mary Virginis (*m*).

The Dean and Chapter of St. Mary in Exon (*n*).

The Provost, Fellows, and Scholars of Queen's College in Oxford, Guardians of the Hospital or Maison de Dieu in Southampton (*o*).

The Dean and Chapter Ecclesiae Cathedralis Christi in Academia Oxon ex Fundatione Reg. H. 8 (*l*).

The Master, Brothers, and Sisters, of the Hospital beatæ Mariæ (*m*).

The Dean and Chapter of St. Mary de Exon (*n*).

Præpositus, Socii, et Scholares Collegii Reginalis in Oxoniâ, Gardianus Hospitalis, &c. (*o*).

But these examples will suffice.

The lease of a corporation granted for charitable purposes does not require enrolment under the statute, 9 Geo. 2. c. 36, the property being already in mortmain (*p*).

11.—*The Crown, and its Officers.*

In consequence of the diminution of the land revenues of the crown by the improvident grants of preceding monarchs, it was found necessary in the reign of Queen Anne to impose a legislative restraint on the alienating power of herself and successors (*q*); and numerous acts of parliament have, at different periods, modified and regulated its exercise. Sir William Blackstone lamented the misfortune of the statute having been made too late, after almost every valuable possession of the crown had been granted away for ever, or else upon very long leases; though (he observed) it might be of some benefit to posterity, when those leases came to expire (*r*).

(*l*) *Button v. Wrightman*, Poph. 56.

(*m*) *Clark's case*, 4 Leon. 11.

(*n*) *Willis v. Jermin*, 1 Cro. Eliz. 167; S. C. 2 Leon. 97. *North's case*, Mo. 361.

(*o*) The case of the Provost and Scholars of Queen's College in Oxford, 1 Leon. 134; S. C., almost verbatim,

4 Leon. 85.

(*p*) *Walker v. Richardson*, 2 Mees. & Wel. 382; S. C. Mur. & Hurl. 251. *The Attorney-General v. Glyn*, 12 Sim. 84.

(*q*) 1 Anne, stat. 1. c. 7. ss. 5. 6.

(*r*) 1 Bla. Com. 287. and preamble to sect. 5 of 1 Anne, stat. 1. c. 7.

Until the reign of King George the 4th, crown leases of lands within the ordering and survey of the court of Exchequer were made in the name of the king or queen regnant, and passed under the great seal or Exchequer seal; but the delay, inconvenience, and expense, incident to this mode of proceeding (*s*) suggested the expediency of delegating the management of property within that ordering and survey to the commissioners of the woods, forests, and land revenues of the crown. This alteration was effected by the statute 1 & 2 Geo. 4. c. 52, the provisions of which have since been considerably extended and improved under the sanction of parliament. I propose, therefore, an examination of the powers of leasing granted to the commissioners, before I enter upon those still retained and exercisable by the crown; and although this arrangement may involve a violation of logical propriety, I prefer it as being calculated to present the subject to the reader in one uninterrupted view. With the same design, I have comprehended in this chapter several topics connected with the main subject, which, in accordance with strict analysis, ought to be distributed under various divisions of the work.

The subject may be treated,

1st, With reference to hereditaments lying within the ordering and survey of the Exchequer in England or Wales, in Ireland, and in the Islands of Man and Alderney.

2ndly, With reference to hereditaments in Scotland.

3rdly, With reference to hereditaments within the ordering

(*s*) These leases were formerly prepared by the Clerk of the Pipe, at an average expense, where lands were demised, of about 60*l.* each; and of about 50*l.* each where houses were let. This expense, according to the then system of management was borne entirely by the crown; for, although the passing of the leases through the different offices was nominally paid for by the lessees, it was in fact a charge upon the crown, the practice being, in setting the rents, to deduct from the

annual value of the estates an annuity equal to the expense thus incurred. See 4th Report of the commissioners of woods, forests, and land revenues, p. 18. (1823). The charges which had been reduced, in 1826, to nearly one-fourth of their former amount, are now defrayed by the lessees. See 5th Report of the commissioners, p. 10. (1826). A table of the sums payable by the lessees for their proportion of the expenses attending the demise will be found in the Appendix to this Work.

and survey of the chancellor and council of the duchy of Lancaster.

4thly, With reference to hereditaments parcel of the duchy of Cornwall.

5thly, With reference to hereditaments purchased by, or descended, or devised, to the crown.

6thly, With reference to hereditaments forfeited or escheated to the crown, or taken by the crown by reason of their having been purchased by, or to the use of, or in trust for an alien.

And, 7thly, may be added some remarks relative to other requisites and matters of form connected with crown leases.

I consider it unnecessary to take notice of such acts as have been passed for the leasing of particular pieces of ground, such as the site of Carlton Palace (*t*) and the like.

1st, With reference to hereditaments lying within the ordering and survey of the Exchequer in England; hereditaments in Ireland; and in the Islands of Man and Alderney.

By the 10 Geo. 4. c. 50 (*u*), which is the principal statute now bearing on the subject, several acts of parliament are repealed in express terms (*x*). The second section repeals all other acts theretofore passed relative to his Majesty's woods, forests, parks, chases, and to the land revenue of the crown in England and in Ireland, or either of them, so far as the same are inconsistent with, or repugnant to, the powers and provisions of 10 Geo. 4. The repeal, however, of these acts did not revive any act thereby repealed, nor annul nor prejudice any lease or thing made or done by virtue of any such act (*y*); and it was provided (*z*), that in case any contract

(*t*) 7 Geo. 4. c. 77. 9 Geo. 4. c. 70.

(*u*) 10 Geo. 4. c. 50.

(*x*) The following acts connected with the subject were repealed, except so far as they related to hereditaments within the ordering and survey of the chancellor and council of the Duchy of Lancaster, viz., 34 Geo. 3. c. 75.

46 Geo. 3. c. 151. 48 Geo. 3. c. 73.

50 Geo. 3. c. 65. 52 Geo. 3. c. 161.

54 Geo. 3. c. 70. 56 Geo. 3. c. 16.

1 Geo. 4. c. 71. 1 & 2 Geo. 4. c. 52.

7 & 8 Geo. 4. c. 66. 7 & 8 Geo. 4. c. 68.

(*y*) 10 Geo. 4. c. 50. s. 3.

(*z*) Ibid.

should have been entered into, or proceeding instituted, before the commencement of 10 Geo. 4, under any of the said acts, which should not have been completed, the same should be completed, under the provisions of the said acts, as if the same had not been repealed, unless the commissioners should think it more expedient to complete the same under the provisions of 10 Geo. 4, which they were empowered to do.

And, after noticing that there might be cases in which leases made, or purporting to be made, under former acts were invalid by reason of the provisions of the said acts not having been duly complied with, or on other grounds, and the expediency that power should be given to confirm such leases, the act provided (*a*), that in any case where a lease theretofore made under the authority or supposed authority of any act theretofore passed relating to the revenues of the crown should be defective, void, or liable to be set aside, by reason of the parties not having been duly authorised to make the same, or by reason of the omission of any survey, or by reason of the provisions of the act under which the same should purport to be made not having been duly complied with, or by reason of such lease not having been in fact authorised by such act, or having been made after such act should in fact have been repealed, it should be lawful for the commissioners in case the lease should not be absolutely void, to confirm the same, either in whole or in part, and either absolutely or conditionally, and on such terms as to them should seem meet; or, in case such lease should be absolutely void, to make any lease of the same premises, or any part, for the purpose of giving any person an interest therein not greater or more beneficial than the interest which he would have had under the prior lease, in case the same had been valid.

Shortly after the passing of this act, the office of the Surveyor-General of his Majesty's works and public buildings

(*a*) 10 Geo. 4. c. 50. s. 46.

was united to the office of the commissioners of the woods, forests, and land revenues; and by the combined operation of the statute of 10 Geo. 4. c. 50. and of 2 Wm. 4. c. 1. (*b*), by which that union was effected, all honours, hundreds, castles, lordships, manors, forests, chases, woods, parks, messuages, lands, tithes, fisheries, franchises, services, rents, and other land revenues, possessions, tenements, and hereditaments, whatsoever (advowsons of churches and vicarages only excepted) which then belonged, or thereafter should belong to his Majesty, his heirs or successors, within the ordering and survey of the court of Exchequer of England or Wales, in Ireland, in the Isle of Man and its dependencies, and the Isle of Alderney, whether in possession, remainder, or reversion, were placed under the management of these commissioners, called "The Commissioners of his Majesty's woods, forests, land revenues, works, and buildings;" who are not to exceed three in number; and are to be appointed from time to time by letters patent under the great seal (*c*).

They are required to observe the orders and instructions, not contrary to the act, 2 W. 4. c. 1, which shall from time to time be given to them by the lord high treasurer, or the commissioners of the treasury, for the time being, or any three or more of them, touching the performance of the duties, and the exercise of the powers, imposed and conferred by the act (*d*).

And we may here remark, that where anything is required, directed, or permitted to be done, or shall by any future act be required, directed, or permitted to be done by the commissioners of woods and forests, &c., the same may be as effectually done by any two of them, as if done by all, unless express provision be made to the contrary (*e*). And when anything is required, directed, or permitted to be done by the commissioners of the treasury, the same may be done by

(*b*) 2 W. 4. c. 1.

c. 50. ss. 9, 16.

(*c*) 10 Geo. 4. c. 50. s. 3. 2 W. 4. c. 1. s. 1.

(*e*) See *Coombes v. Dutton*, 5 Mees. & Wel. 469; and post, p. 193.

(*d*) 2 W. 4. c. 1. ss. 2, 3. 10 Geo. 4.

any three of them, unless express provision to the contrary be made by such future act (*f*).

The powers of leasing conferred on the commissioners of woods and forests, &c., are defined by 10 Geo. 4. c. 50. Other incidental matters are directed by the statute of William the 4th.

Previously to making, or entering into any agreement for making, any lease, a survey of the premises proposed to be leased, and an estimate of the value thereof, must be taken and made by a surveyor or surveyors to be appointed by the commissioners: and the surveyor or surveyors must certify by a report in writing under hand, and verified by oath, the true value of the premises surveyed (*g*); except in cases where from the nature of the premises, or from any circumstances relative thereto, the value cannot be known or ascertained by means of a survey; or where the value of the premises shall be previously known to be so inconsiderable that it shall not be deemed expedient to incur the expense of a survey; or where such premises, being in Ireland, shall have been previously surveyed and valued under the direction of any commissioners appointed by the Lord Lieutenant of Ireland to inquire into the state of the crown lands in Ireland, at any time since the year 1820, and a report of such survey and valuation shall have been made on oath, and shall previously to such lease or agreement being made, have been deposited in the office of the commissioners of woods and forests, &c.; in any of which cases the commissioners may make such lease or agreement, without a survey or estimate (*h*).

The authority of the lord high treasurer, or the commissioners of the treasury, for the time being, to be signified by some warrant under hand, must also be obtained, before a valid lease can be granted. And such authority may be given either generally for any particular class of cases, or for any particular lease, and either without any condition or

(*f*) 10 Geo. 4. c. 50. s. 16. 2 W. 4.
c. 1. s. 10.

(*g*) 10 Geo. 4. c. 50. s. 61.
(*h*) 10 Geo. 4. c. 50. s. 62.

restriction, as to the lord high treasurer or commissioners of the treasury may seem meet (*i*).

The term allowed to be granted depends upon the object of the lease, or the nature of the property demised.

Generally speaking, the commissioners of the woods, &c., may lease, or enter into any contract for leasing, the premises to any person, or body politic, corporate, or collegiate, for any term not exceeding thirty-one years from the time of making the lease or agreement for a lease (*k*). But where the premises are tenements or hereditaments, the greater part of the yearly value of which shall at the time of making the lease or agreement consist of any building or buildings; or where the premises are land proper for the erection of any houses or other buildings, with or without gardens, yards, curtilages, or other appurtenances, to be used therewith, and where the lessee or intended lessee shall covenant or agree to erect a building or buildings thereon of greater yearly value than such land; or where the premises are land proper for gardens, yards, curtilages, or other appurtenances to be used with any other house or other building erected or to be erected on any ground belonging either to the crown (*l*), or to any other proprietor, or proper for any other purpose calculated to afford convenience or accommodation to the occupiers of any such house or building; in these cases, the commissioners are authorised to make any lease, or agreement for a lease, for any term not exceeding ninety-nine years, from the time of making such lease or agreement (*m*). It is provided (*n*), however, that no land proper for gardens, yards, curtilages, or other appurtenances, to be used with any house or other building erected or to be erected on any ground belonging to the crown, or proper for any other purpose calculated to afford convenience or accommodation to the occupier or occupiers of any such house or building, shall, under the

(*i*) Sect. 60.

(*k*) Sect. 22.

(*l*) The words of the act are, "His Majesty, his heirs or successors," in lieu of which, for brevity's sake, the

words "The Crown" will, with few exceptions, be hereafter used.

(*m*) 10 Geo. 4. c. 50. s. 23.

(*n*) Sect. 24.

provisions of the act (10 Geo. 4. c. 50) authorising the same to be demised for any term not exceeding ninety-nine years, be demised, or agreed to be demised, for any term which shall extend beyond the duration of the subsisting lease or leases of the house or building to which the same shall be intended to be attached.

It is also provided (*o*), that these powers of leasing shall not extend to the demising or leasing of any of the royal forests, parks, or chases, in England, or any part or parcel thereof.

Many purprestures, encroachments, and trespasses, having been made upon the soil of the crown within the boundaries of some of the royal forests without any effectual interruption, it was considered that in some cases it would be expedient to permit the persons to continue in possession, and in others to make compensations for the surrender of such possessions, and it was therefore enacted (*p*), that in all cases of purprestures or encroachments in any of the royal forests, which purprestures or encroachments shall appear to have been inclosed, or used, and occupied, by the person then in possession thereof, or by any person under whom the same are claimed to be held, without any effectual interruption by or on the part of the crown for any period not less than ten years, it shall be lawful for the commissioners to make compensation in money, in consideration of the removal of any such encroachment, or to grant to the person in possession a lease for any term not exceeding three lives or thirty-one years either of such encroachments or purpresture, or any other part or parts of the forest in lieu thereof; provided that there shall be reserved in every such lease, such annual rent to be paid to the crown as under all the circumstances of the case shall by the commissioners be deemed reasonable and proper.

(*o*) Sect. 25. See ss. 96 and 97, noticed post.

(*p*) 10 Geo. 4. c. 50. s. 96. See also 1 & 2 Vict. c. 42, which empowers the

commissioners to confirm the title to, and to grant leases of, encroachments in the forest of Dean, in the county of Gloucester.

The commissioners are also authorised (*g*) to grant any lease, for any term not exceeding thirty-one years, of any part of the royal forests for the purpose of making any railway, tramroad, or inclined plane, or for erecting any steam-engine, or other works, or machinery, with a license in such lease to make or erect the same, and to raise, get, and carry away any stone, slate, coal, ore, or marl, in any of the royal forests, under such modifications and restrictions, for such yearly rent, and upon such terms and conditions, as to them may seem expedient; provided that no such lease or license for the purpose of making such railway, tramroad, or inclined plane, or of erecting such steam-engine, or other works or machinery, be granted in any case where the use of the same would interfere with, or in any way abridge, or prove inconsistent with, the exercise of the rights vested in either of the companies established by the acts 40 Geo. 3. c. clviii. (*r*), and 49 Geo. 3. c. clix. (*s*), without the previous consent and concurrence of the companies incorporated under the said acts.

Leases authorised by the act may be made to take effect either as leases in possession, or leases of the reversion, subject to any existing lease, or by way of future interest, provided the same be not made for any term which will extend beyond thirty-one years; or where leases for ninety-nine years are authorised, then provided such lease be not made for any term which will extend beyond ninety-nine years from the time when such leases shall be made; or if made in pursuance of a previous agreement, then from the time when such agreement shall have been made (*t*).

We may next consider the provisions of the act relative to the reservation of rent.

In general, there must be reserved and made payable during the whole term such a clear yearly rent as to the commissioners shall appear reasonable, without taking any fine (*u*),

(*g*) Sect. 97.

(*r*) The Bullo Pill Railway Company.

(*s*) The Lydney and Lidlbrook Rail-

way Company.

(*t*) 10 Geo. 4. c. 50, s. 26.

(*u*) Sect. 28.

except under circumstances to be noticed shortly (*x*). And, in estimating the amount of rent to be reserved, the commissioners may take into consideration the surrender of any existing lease of the property comprised in the lease to be granted, or of any part thereof; and the acceptance of any such surrender shall not be considered as the taking of a fine within the meaning of the last clause (*y*).

In leases of any land or ground, tenements, or hereditaments, where, at the time of granting such leases, (or, if such leases shall be granted in pursuance of a previous agreement, at the time when such agreement shall have been made,) there shall not be any substantial buildings upon the land to be demised, and the lessees shall agree to erect on such land any buildings of greater yearly value than the land demised, or agreed to be demised, it shall be lawful to reserve, during any period not exceeding the first three years of the term, a nominal rent, or such other rent only as to the commissioners shall seem fit (*z*).

And in leases to be granted for any term not exceeding ninety-nine years, under the power in that behalf given, of any land or ground, tenements, or hereditaments, where, at the time of granting such lease, (or, if such lease shall be granted in pursuance of a previous agreement, at the time when such agreement shall have been made,) there shall be any substantial buildings upon the land to be demised, and the buildings thereupon shall not require, or shall not be intended or agreed to be rebuilt, it shall be lawful for the commissioners to take a fine on the granting of such leases, provided that such fine be not taken in lieu of any further part than one third of such annual sum as shall appear to them would have been a reasonable rent or consideration for such leases in case no fine had been taken, the remainder of such annual sum being reserved by way of rent; and the amount of the fine to be so taken shall not be less than the sum to which

(*x*) *Infra*, in this page.(*y*) 10 Geo. 4 c. 50. s. 29.(*z*) Sect. 30.

the portion of the annual sum in lieu of which it shall be taken would have amounted during the term to be granted, deducting a discount, to be computed by way of compound interest, at no higher rate than the highest legal rate of interest in England, if the property to be demised shall be in England or Wales, or than the highest legal rate of interest in Ireland, if the property to be demised shall be in Ireland (*a*).

If the lease be of mines, collieries, or quarries, the commissioners may reserve either an annual rent in money, or any annual rent in money and such share of the produce in kind, or such rent or duty upon the quantity or value of such produce, as they shall think proper (*b*).

Leases of [the profits of præ and post fines arising within the principality of Wales and county palatine of Chester (*c*),] the profits of tolls, markets, and fairs, tithes, fisheries, ferries, and other articles of uncertain produce, may be granted at such rent only, or at such rent and for such fine, as to the commissioners shall seem proper (*d*).

The amount of rent in leases of encroachments on the royal forests, and of part of the royal forests for railways, tramroads, &c., rests, as we have seen (*e*), in the discretion of the commissioners.

All rents must be reserved and made payable to her Majesty, her heirs and successors, clear of all taxes and assessments (*f*).

Every lease must contain a proviso or condition for re-entry on non-payment of the rent, or non-performance of the lessee's covenants (*g*).

The lessee must execute a counterpart (*h*).

And there must be no exemption of the lessee from punishment for waste, except in leases of mines, minerals, quarries, or collieries, and in leases to be made under the

(*a*) Sect. 31.

(*b*) Sect. 33.

(*c*) The profits within the brackets were abolished by 3 & 4 W. 4. c. 74.

(*d*) Sect. 32.

(*e*) Ante, p. 191-2, ss. 96. 97.

(*f*) Sect. 27.

(*g*) Sect. 27.

(*h*) Ibid.

power given by the act of leasing for a term not exceeding ninety-nine years (*i*), in which case the lessee may be made dispunishable for waste, if the commissioners shall think proper (*k*).

The receivers under the act, whom the commissioners are authorised to appoint (*l*), are empowered, by themselves or deputies, to distrain for rent in arrear from any lessee, occupier, or tenant, of premises which shall be in the collection, receipt, or management, of such receivers respectively; and the goods distrained to impound, sell, and dispose of: But every receiver is required, in making or causing to be made any such distress, and in relation to any question of law or otherwise which may arise thereupon, to conform to all such orders and regulations as shall be given him in that behalf by the commissioners (*m*).

If any lessee, occupier, or tenant, of premises of which the annual rent shall exceed 50*l.*, shall be in arrear for, or hold in his custody, any rent or mesne profits, or other produce, due or belonging to the crown, arising from any part of the crown possessions or land revenues, for the space of three calendar months after he shall have been applied to, either personally or by letter from the receiver, without paying over the same to such receiver, the defaulter shall be charged with interest for such arrear, to be calculated after the rate of 5*l.* for every 100*l.* by the year, upon the sum in arrear, from the time at which the same became due, up to the day on which the same shall be actually paid; and such interest shall be added to the rent or mesne profits or other profits or produce so in arrear, and shall be recovered and received by the same ways and means as rents are by the act made recoverable, together with all costs and expenses to be sustained in the recovery thereof (*n*).

But power is given to the commissioners, where they shall think it expedient, but with the consent of the lord high

(*i*) See ante, p. 190.

(*k*) 10 Geo. 4. c. 50. s. 27.

(*l*) Sect. 12.

(*m*) Sect. 90.

(*n*) Sect. 91.

treasurer, or the commissioners of the treasury, to make any composition or agreement with any person for any arrears of rent; and, after payment of any sum agreed upon, the crown will be barred from suing for, or in any manner recovering, any such arrears so compounded for (*o*).

A particular form of a lease of railways, or of encroachments in the royal forests, is prescribed by the act; though the commissioners are authorised to adopt any other which they may deem more expedient. The form provided by the act will be found in the Appendix to this work.

It was also declared, that leases, and contracts for leases, and counterparts, made or entered into by the commissioners under the authority of the act, should be exempt from the burthen of any ad valorem or other stamp duty whatsoever, under any then present or future act, unless the same should be specially subjected thereto by such future act (*p*).

Every lease of premises in England or Wales must, within six months (signifying lunar months) after date, be enrolled at the lessee's expense, in "The office of land revenue records and enrolments" (*q*), in the order of time in which each deed shall be brought into the office for that purpose, and the keeper of the records and enrolments must certify, or cause to be certified, under his hand, or the hand of his deputy or assistant for the time being, upon the instrument, when enrolled, the fact of its having been so enrolled (*r*): And a minute or docket of every such lease must be entered and preserved by the commissioners of the woods and forests, &c., in their office (*s*).

Should the enrolment of any deed or other instrument, or minute or docket, before the keeper of the records and enrolments, or the entry of any deed or other instrument in the office of the commissioners, be omitted or delayed beyond

(*o*) Sect. 93.

(*r*) 10 Geo. 4, c. 50, s. 64. 2 W. 4.

(*p*) Sect. 77.

c. 1, s. 23.

(*q*) 10 Geo. 4, c. 50, s. 63. 2 W. 4.

(*s*) 10 Geo. 4, c. 50, s. 63. 2 W. 4.

c. 1, ss. 13, 15, 21, 22. This office is situate in Spring Gardens.

c. 1, s. 22.

the period provided, the commissioners are authorised, for any reasonable cause to them shown for the omission or delay, to permit such enrolment or entry *nunc pro tunc*, which, when made under such authority, will be as valid as if made within the period limited for that purpose (*t*).

Where any deed or other instrument which shall appear to have been made or executed under the authority of any act passed relating to the possessions and land revenues of the crown shall have written thereon a memorandum of its having been enrolled in the office of records and enrolments, and such memorandum shall purport to be signed by the keeper of the records and enrolments, or by any person acting as his deputy or assistant, such memorandum shall, in the absence of evidence to the contrary, be sufficient proof of the deed or other instrument having been duly made, or executed, and of its having been duly enrolled, and of the provisions of the act having been duly complied with; and such memorandum shall be receivable in evidence without proof of the handwriting of the signature thereto (*u*).

The enrolment of any deed or instrument pursuant to the provisions of the act of 2 W. 4. c. 1, has the same effect as enrolment pursuant to 10 Geo. 4. c. 50 (*x*).

If the premises lie in Ireland, the commissioners must cause duplicates of all leases to be transmitted to the office of record in Ireland in which the original rentals or rent rolls of the crown rents shall be preserved; and every such duplicate shall be there preserved, and remain of record among the other records and muniments preserved in the office (*y*). And not only shall the original lease by which any hereditaments in Ireland shall be demised under the act, but also such duplicate, or a copy of such duplicate, attested by the officer for the time being in whose custody the same shall remain, (and which copies the officer is to

(*t*) 10 Geo. 4. c. 50. s. 68. 2 W. 4. c. 1. s. 27.

(*u*) 10 Geo. 4. c. 50. s. 67. 2 W. 4. c. 1. s. 26. And see *Kinnersley v. Orpe*, 1 Dougl. 56; and 8 & 9 Vict.

c. 113, An act to facilitate the admission in evidence of certain official and other documents.

(*v*) 2 W. 4. c. 1. s. 28.

(*y*) 10 Geo. 4. c. 50. s. 70.

grant to any person applying for the same, on payment of a fee of 1s. for every such copy, and if the same shall consist of more than seventy-two words then a further fee of 1s. for every seventy-two words over the first seventy-two words,) shall be admitted in all courts of law and equity as evidence of the title of the lessees, and all persons claiming under them, to the hereditaments to which such leases shall respectively relate(*z*).

The commissioners are also empowered (*a*) to give any notice, make any claim or demand, and to depute any person to make any entry, which shall be requisite or expedient, with a view either to compel any tenant, lessee, or occupier, of the premises, to quit or deliver up the possession thereof, or to compel the performance of any covenant, contract, or engagement, in relation thereto, or to recover possession on non-performance of any covenant, contract, or agreement, or to compel the payment of any sum of money which ought to be paid in respect thereof, and to give any other notice, make any other claim or demand, and depute any person to make any other entry, which may be requisite or expedient, touching any of the said possessions or land revenues; and every such notice, claim, or demand, given or made in writing under the hands of the commissioners, or any two of them, for such purposes, and every entry which shall be made by any person or persons so deputed upon any of the said estates or possessions, will be effectual to all intents, and will have the like force as if respectively given or made by the crown; and all such notices, claims, demands, or entries, are respectively to be taken to have been given and made by or on behalf of the crown.

With reference to this section it has lately been decided (*b*), that where a lease, dated 18th October, 1825, granted by the commissioners of the woods and forests, contained a clause that if the commissioners for the time being should be desirous of determining the demise, and should give the lessee one

(*z*) 10 Geo. 4, c. 50, s. 71.

(*a*) Sect. 92.

(*b*) *Coombes v. Dutton*, 5 Mees. & Wel. 469.

calendar month's notice in writing, under their hands, the demise should cease, a notice given by two of the commissioners for the time being was sufficient.

Provision is made by the act as well for the indemnity of the lessees, as of the commissioners. With regard to the former, it is declared (*c*), that no person, or body politic, corporate, or collegiate, claiming under any deed or instrument by which any lease shall be made, or purport to be made, by the commissioners, and shall be duly enrolled, shall be bound to inquire whether the commissioners were duly authorised by the lord high treasurer, or the commissioners of the treasury, to make the same; or whether a survey shall have been made; or whether, in cases of leases in Ireland, a duplicate of the instrument shall have been duly transmitted to Ireland; or whether the provisions of the act in other respects shall have been complied with; or whether such lease shall in fact have been authorised by the act, or within its provisions; but that every instrument by which any lease shall purport to be made under the authority of the act shall, after due enrolment, be effectual as against the crown for the purposes for which the same shall have been executed.

And to prevent any question as to the liability of persons paying money under the act, it is enacted (*d*), that no person, body politic, corporate, or collegiate, paying any money under the authority of the act, shall be bound to see to its application, or be answerable for its misapplication or non-application.

As to the commissioners, it is provided (*e*), that nothing contained in the act, or to be contained in any contract, lease, or instrument, thereby authorised, shall extend to charge the person of any of the commissioners executing any such contract, lease, or other instrument, or his heirs, executors, or administrators, or his lands, tenements, goods, or chattels, with or for the performance of any of the covenants, conditions, or agreements, therein contained; but

(*c*) 10 Geo. 4. c. 50. s. 73.

(*d*) Sect. 74.

(*e*) Sect. 17.

that the amount of all sums, costs, &c., which may be recovered against him, his heirs, executors, or administrators, by reason of any such contract, lease, or other instrument, or the covenants, conditions, or agreements therein contained, and also all the costs, &c., which shall be occasioned to him by reason of any such contract, lease, or other instrument, or any covenant, condition, or agreement, therein contained, or any action or suit against him thereupon, shall respectively be discharged out of the moneys to be raised from the said possessions and land revenues of the crown.

In case any difference shall arise between the commissioners and any other person concerning the boundaries, extent, or amount, of any of the lands, tenements, possessions, rents, or land revenues, of the crown, to which the act of 10 Geo. 4. c. 50, relates, or any right of common, right of way, or other right or easement whatsoever, claimed, or to be claimed, in respect of, or as appurtenant to, or in, over, upon, or out of, the same lands, tenements, possessions, rents, and land revenues, or any of them respectively, or otherwise howsoever in respect of or in relation thereto, then it shall be lawful for the commissioners, with the consent of the lord high treasurer, or the commissioners of the treasury, to concur with such person in referring the same to arbitration as in the act is mentioned (*f*): Provided that every such submission to arbitration, and the award, or a duplicate of the same respectively, shall, within three calendar months from the date of each such award, be enrolled in the office of land revenue records and enrolments (*g*), or in the office of record in Ireland, as the case may be; and it is declared that such enrolment shall be good evidence of such submission.

The commissioners must within thirty days after the commencement of the first session of parliament in every year, (without special requisition,) report in writing under their hands and seals to the crown and both houses of parliament what leases shall have been made during the year preceding;

(*f*) 10 Geo. 4. c. 50, s. 94.

(*g*) 10 Geo. 4. c. 50, s. 94. 2 W. 4. c. 1. s. 21.

and state in such reports for what terms or estates such leases shall have been made, and also the annual value of the tenements or hereditaments comprised in every such lease, and the annual value of the same premises by the last preceding survey thereof, where there shall happen to be a further survey and valuation of the same in the custody or power of the commissioners, and what rent shall have been reserved on every such lease, and what fines paid for the same, and upon what other consideration such leases shall respectively have been made; and also, as far as the same can be done, the rents and fines which were reserved and paid upon or for the last preceding lease of such tenements or hereditaments; and the commissioners are also to set forth all such other matters and things concerning the possessions and land revenues of the crown as to them shall seem proper and necessary (*h*).

Several kinds of property, however, are expressly exempted, partly or wholly, from the operation of the act: for instance, it is provided, as we have seen (*i*), that the powers of leasing therein given shall not extend to any of the royal forests, parks, or chases, in England, or any part or parcel thereof (*k*); though the 96th and 97th sections of the act apply to the royal forests (*l*).

And also (*m*) that nothing in the act contained shall extend to impair or affect any rights or powers of control, management, or direction, which have been or may be exercised by authority of the crown, or other lawful warrant, relative to any leases, grants, or assurances, of any of the small branches of the hereditary revenue of the crown, or to fines taken or to be taken, or to rents, boons, and services, reserved or to be reserved, upon such grants, leases, and assurances, or to

(*h*) Sect. 125.

(*i*) Ante, p. 191.

(*k*) Sect. 25.

(*l*) See ante, p. 191.

(*m*) 10 Geo. 4. c. 50. s. 128. The hereditary revenues of the Crown are now carried to, and for the Queen's

life, will make part of the Consolidated fund, by virtue of the statute 1 & 2 Viet. c. 2, which contains (as did the act of 1 W. 4. c. 25. s. 12,) a provision (sect. 12) corresponding with that in the text.

the mitigation or remission of the same, or to any other lawful act, matter, or thing, which has been or may be done touching the said branches, but that the said rights and powers shall continue to be used, exercised, and enjoyed, in as ample a manner as if the act had not been made, and as the same had been or might have been enjoyed by the crown up to the time of passing the act, subject nevertheless to all such restrictions and regulations as were then in force in relation thereto. The restrictions and regulations here alluded to are those provided by the act of Queen Anne (*n*), which enacted (*o*), that the small branches therein mentioned (*p*) of her Majesty's revenue should not be alienable or grantable for any estate or term whatsoever to endure longer than the life of her Majesty, or of such King or Queen as should make such alienation or grant respectively; and that all gifts, grants, alienations, leases, and assurances whatsoever, to be had or made contrary to the provisions of the act should be null and void without any inquisition, scire facias, or other proceeding, to determine or make void the same. This provision now extends to all parts of the United Kingdom (*q*).

The act of 10 Geo. 4. also expressly declared (*r*), that nothing therein contained should (notwithstanding the repeal of the several acts therein contained relating to the land revenue of the crown) extend to, or be construed to repeal, interfere with, or affect, any of the powers, provisions, or authorities, in such acts respectively contained, relating to any manors, messuages, &c., within the ordering and survey of the chancellor and council of the duchy of Lancaster, or to any of the rents and revenues thereof, or to any purchases, sales, or grants, made, or to be made, by, or under the seals of, the said duchy

(*n*) 1 Anne, stat. 1. c. 7.

(*o*) Sect. 7.

(*p*) *Viz.* the first fruits and tenths of the clergy; the fines for writs of covenant and writs of entry, formerly payable in the alienation office, but now abolished, 3 & 4 W. 1. c. 27. s. 36; the post fines, now also abolished;

the revenue of the wine licenses; and the revenue arising by sheriff's prof-fers, and compositions in the Exchequer, and by seizures of uncustomed and prohibited goods.

(*q*) 1 & 2 Vict. c. 95. s. 4.

(*r*) 10 Geo. 4. c. 50. s. 130.

and county palatine of Lancaster, or either of them; but that all and singular the said several powers and provisions, so far as the same related to or concerned the said duchy and county palatine, should remain in full force; and that the said manors, messuages, &c., of and belonging to the said duchy should continue to be granted and demised by the crown, for the like terms, estates, and interests, and the rents and revenues thereof to be received and applied under the order and direction of the chancellor and council and other officers of the duchy, to the like purposes, and in like manner, as before the passing of the act.

Leases of lands parcel of this duchy will form the 3rd division of our inquiry.

So the crown is empowered (*s*), out of the possessions and land revenues of the crown to which the act relates, to grant to any body or bodies politic or corporate, or any person or persons whomsoever, and their heirs and successors (*t*) respectively, for such estate or interest therein as to the crown shall seem meet, any building proper to be used as, or converted into, or any ground proper for the site of, any church or chapel, with or without a cemetery or burial ground thereto, or any ground proper for a cemetery or burial-ground to any church or chapel, and any house with its appurtenances, and with or without a garden thereto, proper for the residence of the spiritual person who may serve such church or chapel, or any ground proper for the site or sites of any such residence, or of any parochial or district school: and such body or bodies politic or corporate, or any person or persons, and their heirs, successors, executors, or administrators (*u*), have full capacity to hold the same. And whenever it shall please the crown to make such grant, the lord high treasurer, or the commissioners of the treasury, are to issue a warrant under hand to any such body, &c., which warrant shall be exempt from stamp duty, and shall, if the same shall relate to

(*s*) 10 Geo. 4. c. 50. s. 45, which repealed 7 & 8 Geo. 4. c. 66.

(*t*) The words "executors and ad-

ministrators" appear to have been omitted by accident.

(*u*) See note (*t*), sup.

England and Wales, be enrolled as before mentioned (*x*); and, if the same shall relate to a grant in Ireland, shall be enrolled in the office of record in Ireland in which the rentals or rent rolls of the Queen's rents shall be preserved; and the enrolment of the warrant shall be certified at the foot or on the back thereof by the proper officer under hand; and the warrant when so enrolled shall be returned with such certificate of enrolment to the grantee of the premises; and after such enrolment the grantee or grantees named in such warrant, and his or their heirs, successors, executors, or administrators (*y*), shall be adjudged to be in the actual seisin or possession of the premises specified in the warrant, and shall enjoy the same, either absolutely and in perpetuity, or for such limited estate, term, or interest, and under and subject to such reservations of rent, or other acknowledgments, conditions, or restrictions, and upon such trusts, and for such purposes, as shall be specified in such warrant. But it is provided that nothing in the act contained shall extend to enable the crown to grant more than five acres in any one grant for any of the purposes aforesaid, or to grant any premises in any one instance which shall exceed in value the sum of 1,000*l*.

By a recent act (*z*), the Rolls estates are vested in the Queen as part of the possessions and land revenues of the crown, and are placed within the ordering and survey of the court of Exchequer in England, and made subject to the provisoes, powers, and authorities, contained in the acts 10 Geo. 4. c. 50, and 2 W. 4. c. 1, and to all such other provisions, powers, and authorities, in every respect as the other possessions and land revenues of the crown within the ordering and survey of the said court of Exchequer are subject to.

2. With reference to hereditaments in Scotland.

In a late session of parliament an act (*a*) was passed, which

(*x*) The mode of enrolment prescribed by 10 Geo. 4. c. 50, was altered, as we have seen, by 2 W. 4. c. 1. See ante, p. 196.

(*y*) See ante, p. 203. n. (*t*).

(*z*) 1 Vict. c. 46. s. 2. As to leases by the Master of the Rolls, see post.

(*a*) 2 & 3 W. 4. c. 112.

authorised the placing of the hereditary land revenues of the crown in Scotland under the management of the commissioners of the land revenues of the crown in England and Ireland. And it was provided, that it should be lawful for the lord high treasurer, or the commissioners of the treasury of the United Kingdom of Great Britain and Ireland, for the time being, or any three or more of them, by warrant under hand, to order and direct, that, from and after the time to be mentioned in such warrant, all the revenues, debts, duties, and profits, appertaining, or which thereafter should appertain, to the crown, within Scotland, and all honors, castles, manors, lands, tenements, and hereditaments, in Scotland, which then did or thereafter should appertain to the crown by virtue of any attainder, outlawry, seizure for any crime, or cause of forfeiture, debt or duty, or upon any extent, commission, or otherwise, or by virtue of the royal prerogative, or by any other right or title whatsoever; and all the rents, issues, and profits thereof, or any of them; and also all and every the goods, chattels, debts, credits, rights, titles, and personal estates, within Scotland anyways accruing or belonging, or which thereafter should belong, to the crown by force or virtue of the royal prerogative, or of any attainder, extent, inquisition, debt, duty, or forfeiture, or by any other right, title, ways, or means whatsoever, and all the remedies and means for recovering the same, or the possession thereof, and all accounts relating thereto, [and also all and every forfeitures and penalties which had been incurred, or should or might incur, or become anyways due and payable, in Scotland, by force or virtue of any penal or other laws or statutes whatsoever (*b*);] and also all fines, issues, forfeitures, or penalties, of what nature or kind soever, happening, arising, or accruing, to the crown within Scotland, save and except such as were then under the management of the commissioners of his Majesty's customs and excise respectively, should be under the management of the commissioners for

(*b*) The part within brackets was subsequently repealed by 3 & 4 W. 4. c. 69. s. 1.

the time being of his Majesty's woods, forests, land revenues, works, and buildings, in England and Ireland, and their successors, acting under or by virtue of the acts, 10 Geo. 4. c. 50, and 2 W. 4, c. 1; and that from the time to be mentioned in such warrant the duties theretofore performed, and the powers theretofore exerciseable, by the barons of the court of Exchequer in Scotland, about the management of such hereditaments and revenues respectively, should be performed by the commissioners of the woods and forests, &c., and their successors; and that all acts, deeds, bonds, contracts, agreements, and other instruments, relating to such hereditaments and revenues respectively, in which the said barons in Scotland were named, should apply to the commissioners for the time being of woods and forests, &c., as if such commissioners had been originally named in and made parties to such acts, deeds, bonds, contracts, agreements, and other instruments, instead of the barons of the Exchequer.

This act being found insufficient for the purposes for which it was made, recourse was again had to the legislature, who in the next session of parliament passed another act (*c*) to enlarge and extend the powers of the commissioners in relation to the management and disposition of the land revenue of the crown in Scotland. By this statute it was provided (*d*), that the commissioners should have and exercise all the powers and authorities whatsoever, with regard to his Majesty's land revenue, lands, teinds, feu retour, and other duties and casualties in Scotland under their management and control, as were contained in the Act of 10 Geo. 4. c. 50, with respect to his Majesty's land revenue in England; and (*e*) that all the provisions in that act contained, either expressly or by reference to other acts, relating to the selling, leasing, exchanging, and general administration, of the possessions and land revenues of the crown in England, and all other the powers, provisions, and authorities, in that act given to the commissioners, should, so far as the same were appli-

(*c*) 3 & 4 W. 4. c. 69.

(*d*) Sect. 2.

(*e*) Sect. 3.

cable, extend to the act now under notice, except that in all cases in which the sanction of the court of Exchequer in England was by 10 Geo. 4, made necessary, the sanction and authority of the court of Session in Scotland should be sufficient with respect to the possessions and land revenues of the crown in Scotland.

And, in lieu of the enrolment directed by 10 Geo. 4, the commissioners are to cause duplicates of all leases granted by them by the authority of the act under notice, of any lands or other heritable property or subjects of the crown in Scotland, to be transmitted to the office of Chancery of Scotland, there to be recorded or registered, and to be there preserved and recorded among the other records and muniments relating to the lands or other property or subjects of the crown preserved in such office; and a minute or docket of every such lease is to be entered and preserved by the commissioners in their office (*f*).

The 8th section provides, that not only the original deed or other document, but also the duplicate thereof, to be so transmitted, or a copy or extract of such duplicate, attested by the officer for the time being in whose custody the same shall remain, (and which copies the officer is required to grant on payment of a fee in the act mentioned,) shall be admitted in all courts as evidence of the right and title of the lessees and all persons claiming under them.

And by the 20th section it is enacted, that all the powers and provisions in the act contained shall extend to the lands, revenues, and other property and subjects of the Prince and Steward of Scotland.

Doubts having arisen as to the powers of the commissioners of the treasury in relation to the recovery, management, superintendence, and disposition of the interests of the crown, as *ultimus hæres*, and in cases of bastardy, in Scotland, it was enacted (*g*), that all powers for the ascertaining and recovering, and for the management, superin-

(*f*) Sect. 7.

(*g*) 5 & 6 W. 4. c. 53. s. 1.

tendence, and care, of all rights and interests of the crown, in Scotland, as *ultimus hæres*, or in cases of bastardy, or by reason of any forfeiture whatsoever, should be vested in the lord high treasurer, or the commissioners of the treasury, or any three or more of them, for the time being, in the same manner, and to the same extent, as such powers were vested in the lord high treasurer, or the commissioners of the treasury, for the time being, prior to the passing of any of the acts, 6 Geo. 4. c. 17; 10 Geo. 4. c. 50; 2 W. 4. c. 1; 2 & 3 W. 4. c. 112; and 3 & 4 W. 4. c. 69 (*h*).

The second section declares that all the former acts of the commissioners of the treasury in relation to such rights and interests in Scotland shall be valid.

By the third, a power is conferred on the crown, out of the possessions and land revenues of the crown in Scotland, to grant any building or land for churches, &c., similar to that conferred by 10 Geo. 4. c. 50. s. 45 (*i*); such grants to be carried into effect by charters and other instruments, according to the law and practice of Scotland, and not otherwise; and a minute or docket of every such grant or warrant is to be entered and preserved by the commissioners of woods and forests, &c., in their office (*k*); and in every report to be made by them to the crown and Parliament concerning the land revenue of the crown, they are to certify every grant made by virtue of the act since their last preceding report, and to whom and for what purpose the same shall have been made, and what land shall be comprised therein, and all other particulars relating thereto (*l*).

3. With reference to hereditaments within the ordering and survey of the chancellor and council of the duchy of Lancaster.

Hereditaments belonging to the crown in right of the

(*h*) All these acts are noticed sup., except 6 Geo. 4. c. 17, which is referred to post, p. 223, relating to the disposition of leasehold premises taken by the crown in right of the duchy of

Lancaster on forfeiture, &c.

(*i*) See ante, p. 203.

(*k*) Sect. 4.

(*l*) Sect. 5.

duchy of Lancaster, though excepted from 10 Geo. 4. c. 50 (*m*), and unaffected by 2 W. 4. c. 1, and the other acts noticed in the preceding divisions, are still subject, as to their demisable properties, to various statutory restrictions. The act of Queen Anne (*n*) yet affects them partially. By the fifth section it was enacted, that all and every lease or other assurance by her Majesty, her heirs or successors, under the seal of the duchy and county palatine of Lancaster, of any manors, messuages, lands, tenements, rents, tithes, woods, or other hereditaments, (advowsons of churches and vicarages only excepted,) belonging or to belong to, or in trust for, her Majesty, her heirs or successors, in possession, reversion, remainder, use, or expectancy, in right of the duchy or county palatine of Lancaster, should be void (*o*), unless the same should be for some term not exceeding one-and-thirty years or three lives, or for some term of years determinable upon one, two, or three lives; and unless such lease or assurance respectively should be made to commence from the date or making thereof; and if such lease or assurance should be made to take effect in reversion or expectancy, that then the same together with the estate or estates in possession in the premises should not exceed three lives, or the term of thirty-one years in the whole; and unless such lease or assurance should be so made that the tenant should be liable to punishment for waste; and unless there should be reserved the ancient or most usual rent, or more, or such rent as had been reserved, yielded, and paid, for the premises therein contained, for the greater part of twenty years before the making thereof; and where no such rent should have been reserved or payable, that then upon every such lease or assurance there should be reserved a reasonable rent, not being under the third part of the clear yearly value of the premises comprised in such lease; and unless such respective rents should be made payable to her Majesty, her heirs or

(*m*) Sect. 130.

(*n*) 1 Anne, stat. 1. c. 7. s. 5.

(*o*) Without any inquisition, seire

facias, or other proceeding, to determine or make void the same. Sect. 7.

successors, who should make such lease, and to her or their heirs or successors, during the whole term or time of the continuance thereof.

But this clause has undergone considerable modification, and must be considered as applicable to such leases only as are not provided for by the statutes to which we now direct our attention.

By the statute 48 Geo. 3. c. 73, it was enacted (*p*), that where any land or ground belonging, or thereafter to belong, to the crown (*q*) within the ordering and survey of the duchy of Lancaster, should be deemed by the chancellor of the duchy of Lancaster for the time being fit and proper for gardens, yards, curtilages, and other appurtenances, to be used and enjoyed with any house or houses or buildings erected or to be erected upon ground belonging either to the crown, or to any other proprietors, it should be lawful for the crown to demise or grant such land or ground to any person or persons, or to any bodies politic or corporate, under the seal of the duchy and county palatine of Lancaster, for any term or estate not exceeding ninety-nine years, to be computed from the date or making of any such lease or grant respectively; or if any such lease or grant should be made to take effect in reversion or expectancy, then that the term and estate thereby to be granted, together with the term or estate, terms or estates, in possession, of and in the same lands and ground, should not exceed ninety-nine years, computed from the date or making thereof.

But it was provided (*r*), that no land or ground for garden, yard, curtilage, or other appurtenance, to be used and enjoyed with any houses or buildings holden or to be holden under any lease from the crown, should be demised for any term or estate exceeding in duration the term or estate for which the houses or buildings to which such land or ground should be so attached as garden, yard, curtilage, or other appurtenance, should be holden.

(*p*) 48 Geo. 3. c. 73, s. 1. (*q*) The words are "His majesty his heirs or successors."

(*r*) Sect. 2.

The first section of this act (48 Geo. 3. c. 73) was enlarged by the 3rd section of 52 Geo. 3. c. 161 (s), which, after noticing the expediency of extending it to ground calculated to afford accommodation or convenience to the inhabitants of any house or building, although the same ground might not be demised with, or attached to, any such house or building, or let as a garden, yard, or curtilage thereto, enacted, that where any land belonging, or thereafter to belong, to the crown within the ordering or survey of the chancellor and council of the duchy of Lancaster should be deemed by the chancellor of the duchy of Lancaster for the time being proper to be let and used for, or appropriated to, any purpose calculated to afford convenience or accommodation to the occupiers or inhabitants of any house or houses erected or to be erected upon ground belonging either to the crown, or to any other proprietor or proprietors, it should be lawful for the crown to demise such land to any person or persons, or to any body or bodies politic or corporate, under the seal of the duchy and county palatine of Lancaster, for any term or estate not exceeding ninety-nine years, to be computed from the date or making thereof, with all such powers, privileges, and authorities, as might be thought fit and requisite for the effecting or promoting the object and intent of such demise; so as there should be reserved upon every such demise such annual rent or rents as should be deemed by the chancellor of the duchy of Lancaster for the time being a reasonable consideration for every such demise, and without taking any fine for the same.

Another section of the act, 48 Geo. 3. c. 73, provided (t), that where any new edifice or building should be erected, or agreed to be erected, on ground belonging to the crown, or held under any lease from the crown, for the enlargement of, and to be united to, and occupied with, any house or other building held under any other lease from the crown, it should be lawful to grant a new lease for any term not

(s) 52 Geo. 3. c. 161. s. 3.

(t) 48 Geo. 3. c. 73. s. 20.

exceeding ninety-nine years, as well of the ground on which such new edifice or building should be erected, or agreed to be erected, as of all or any part of any other tenements or hereditaments contained in such leases; provided that the greater part of the yearly value of the tenements and hereditaments so to be granted should consist of the buildings thereon, or of ground set apart and appropriated for building, or for necessary gardens, yards, curtilages, or other appurtenances, as in the act is mentioned. It is observable that 52 Geo. 3. c. 161, does not contain any provision corresponding with this, nor any words which can tend to its repeal.

The sixth section of the statute of Anne, which authorised leases for fifty years, or three lives, for the purpose of repairing or re-edifying buildings, was in effect repealed by 52 Geo. 3. c. 161 (*u*); and many important provisions were then substituted. By this statute, enlarging the provisions of 48 Geo. 3. c. 73, it was enacted (*x*), that when any land belonging to the crown within the ordering and survey of the chancellor and council of the duchy of Lancaster, fit for the erection of houses or other buildings thereupon, or for the necessary yards, curtilages, and other appurtenances, to be used and enjoyed therewith, and (*y*) should be by their order directed to be appropriated to that use, or where the lessee should agree and covenant to erect buildings thereon of greater yearly value than the land to be leased; or where the greatest part of the yearly value of any tenements or hereditaments belonging to the crown should at the time of making any lease thereof consist of any building or buildings thereupon; in such cases it should be lawful for the crown to demise the land so directed to be set apart, or the tenements or hereditaments of the description last aforesaid, to any person, or to any body politic or corporate, under the seal or seals of the duchy and county palatine of Lancaster, for any term or estate, so as such term or estate should not

(*u*) 52 Geo. 3. c. 161.

(*x*) Sect. 1.

(*y*) The sense requires the omission

of the word *and*, which is in the statute.

exceed ninety-nine years, or three lives, to be computed from the date or making of any such lease; or if any such lease should be made to take effect in reversion or expectancy, then that the term and estate thereby to be granted, together with the term or estate, terms or estates, in possession, should not exceed ninety-nine years, or three lives, computed from the date or making thereof; and so as the respective rents thereafter specified *or* (*z*) reserved for the same, that is to say, where there should happen to be any substantial building or buildings upon the ground to be demised, or *that* (*a*) the building or buildings thereupon should not require, or not be intended and agreed to be rebuilt, there should be reserved to his Majesty, his heirs and successors, an annual rent or rents not being less than two third parts of such annual sum as should be deemed by the chancellor and council of the duchy a reasonable rent or consideration for such building or buildings and ground respectively, for the term and estate intended to be granted, and so as there should be paid to the use of his Majesty, his heirs and successors, a fine or fines to the amount of the remaining part of such annual sum, subject to a discount, which should not be computed at a higher rate than the highest legal interest at the time of making any such lease; and that when there should happen to be no substantial building upon the land so to be demised, or *that* (*b*) the building or buildings thereupon required or should be intended (*c*) and agreed to be forthwith rebuilt, or other new buildings to be erected (*d*) upon such land, then there should be reserved such annual rent or rents as should be deemed by the chancellor and council of the duchy to be a reasonable rent or consideration for such land and old buildings respectively, for the term and estate intended to be granted, without taking any fine for the same; and so as in every lease of land and buildings of the description therein last aforesaid there

(*z*) So in the statute: *q. should be?*

(*a*) So in the statute: *q. where?*

(*b*) So in the statute: *q. when?*

(*c*) So in the statute: *q. should re-*

quire or should be intended?

(*d*) So in the statute: *q. or other new buildings should be intended and agreed to be erected?*

should be contained a covenant or condition on the part of the lessee for the erecting of proper and substantial houses or other buildings thereon within a reasonable time to be in such cases limited for that purpose, and such other covenants for keeping buildings in repair, and doing all such other acts, as the chancellor and council of the duchy should think reasonable; and so as every such rent should be reserved to be paid free of all taxes and assessments whatsoever, for the whole of the term to be granted, except such rent, or such part thereof, during such part of such term, as the chancellor and council of the duchy should think fit to be allowed, not exceeding in any case the term of three years, and so as every such lessee should duly sign, seal, and deliver, a counterpart of his lease; and that every such lease should be good, any thing contained in the act of Queen Anne to the contrary notwithstanding.

Timber on lands proposed to be demised may be made the subject of treaty. The act of 19 Geo. 3. c. 45 (*e*), after reciting that divers lands and tenements parcel of the duchy were held for terms of life or years, wherein all timber and other trees were excepted and reserved to the crown; and that parts of the lands so held would, if planted for the production of wood and timber, produce a greater profit than in a course of husbandry; and that if the lessees were to be benefited by raising and planting trees for timber and other purposes thereon, they might be encouraged so to do, to the great utility of the public; enacted, that it should be lawful for the chancellor and council of the duchy, by their order, to be made in court of revenue, to authorise the surveyors of the woods for the south and north parts respectively of the duchy for the time being to treat with such lessees for securing to them, their executors, administrators, and assigns, such a fair allowance of all moneys which should at any time during the term arise by sale of timber or other trees, or wood, within the lands so held, as should be agreed upon between the surveyors and the lessees; and also for

allowing unto such lessees, at the end of their respective leases, a like fair allowance in money for all timber and other trees which should be then left growing upon their respective farms, according to the value of such timber and other trees ; and it was declared that such agreement, being confirmed by order of the said chancellor and council, should be effectual to all intents and purposes whatsoever.

There may be some doubt as to the enrolment of leases of lands parcel of the possessions of the duchy of Lancaster. The first mention that I can discover of anything relative to the point occurs in the statute 48 Geo. 3. c. 73 (*f*), which provides for *nunc pro tunc* enrolments, by enacting that in all cases where the enrolment of any lease or assignment, or minute or docket thereof, before the auditor of the land revenue, or the auditors of the duchy of Lancaster, or the entry of any lease or assignment, or minute or docket of any lease or assignment, in the office of the surveyor general or auditors of the duchy, had been or should be omitted or delayed beyond the period limited in any such lease, it should be lawful for the chancellor of the duchy, or the surveyor-general, for any reasonable cause to them or either of them shown for the omission or delay, to authorise and permit the making of any such enrolment or entry *nunc pro tunc* ; and that the same respectively when made under such authority should be as valid as if made within the period limited for that purpose.

The next act of parliament (*g*), which extends to duchy lands, provided (*h*), that every agreement and lease thereby authorised, together with a map or plan of the land demised thereby, should be enrolled in the office of the auditor of the land revenue, or a minute or docket thereof entered and preserved in the office of the commissioners of the woods and forests, or in the office of the surveyor-general of the woods and forests for the time being.

The office of auditor of the land revenue was abolished by an act of Will. 4 (*i*), under whose provisions all books of entry,

(*f*) 48 Geo. 3. c. 73. s. 9.

(*g*) 52 Geo. 3. c. 161.

(*h*) Sect. 10.

(*i*) 2 & 3 W. 4. c. 1. s. 13.

records, deeds, instruments, writings, maps, plans, and other official papers, formerly deposited or kept in the office of the auditor of the land revenue were transferred to "the office of land revenue records and enrolments"; and it was enacted (*k*), that all deeds or instruments which, in case the act had not been passed, would or ought, after the 5th of January, 1833, under the authority of the act of 10 Geo. 4. c. 50, or any other act, or in pursuance of any covenant entered into by any person with the King, or the commissioners of the woods and forests, &c., to have been, or might have been, enrolled in the office of any auditor of the land revenue of the crown in England, or in the principality of Wales, or in the office of the commissioners for auditing public accounts, should be enrolled in the office of land revenue records and enrolments.

Thus stand the acts of parliament, whence it should seem that at least such duchy leases as are granted under the provisions of 52 Geo. 3. c. 161, should be enrolled in the office of land revenue records and enrolments under the 2 & 3 W. 4. c. 1. On inquiry, however, at the office of woods and forests, and at the office of land revenue records and enrolments, I am informed that it is not the practice to enrol in the latter any leases of lands parcel of the duchy of Lancaster.

The right of the crown to demise lands, parcel of the duchy, which have escheated, or been forfeited, or purchased by, or to the use of, or in trust for, aliens will be noticed hereafter (*l*).

Leases made by the King of lands parcel of the duchy of Lancaster are not voidable by reason of his nonage. They pass from his person as King, and not as Duke. The latter title merges in the former, it being impossible for the same person to be sovereign and subject (*m*).

If the crown grant a lease of duchy lands professedly in

(*k*) Sect. 21.

(*l*) Post, p. 222.

(*m*) Anon. Dy. 209, b. pl. (22);
S. C. Jenk. Cent. 224, case 84; S. C.
Duchy of Lancaster Leases, Plowd.

212. 4 Inst. 209. Alcock v. Cooke,
5 Bing. 340. 352; S. C. 2 Mo. & Pa.
625. Bro. Ab. tit. Prerogative, pl. 132,
cont., is clearly wrong.

possession, without reciting one then in existence under a previous grant by the crown, and enrolled, the second lease will be void; for when the King's grant cannot take effect according to its terms, the court concludes that he has been deceived, and the grant is therefore void: but this doctrine is applicable only to cases where the preceding lease has been enrolled; for otherwise the subject cannot with certainty know of its existence. And, therefore, if an individual grants a lease, and the reversion comes to the king, who afterwards grants it over, without reciting the prior lease, the grant is good (*n*).

At a very early period the court of Chancery refused an injunction in favour of a party who, upon untrue surmises, obtained a duchy lease, which was sought to be set aside at law by the grantee of the reversion from the crown (*o*).

Where a duchy lease contained a proviso that the lease and all assignments thereof should be enrolled within three months from the date with the auditor of the duchy, or otherwise should become void, a memorandum or certificate on the margin of the lease, signed by the auditor, was held to be proper evidence of the fact of enrolment (*p*). An underlease, not being an assignment, would not in such case require enrolment (*q*).

4. With reference to hereditaments parcel of the duchy of Cornwall.

The eldest son of the crown, as soon as born, succeeds, without a specific grant, to the title of the duke of Cornwall (*r*), and takes, by right of inheritance, a fee-simple in the possessions attached to that dignity (*s*). On the eldest son's death with-

(*n*) *Alcock v. Cooke*, sup.

(*o*) *Cary*, 45. And see *Hungerford's* case, 1 Leon. 30.

(*p*) *Kinnersley v. Orpe*, 1 Dougl. 56. And see *Rowe v. Brenton*, 8 Barn. & Cres. 737. 756; S. C. 3 Man. & Ry. 133. 223.

(*q*) *Kinnersley v. Orpe*, sup.

(*r*) *The Prince's case*, 8 Co. 16, b. 1 Bulstr. 133. 1 Bla. Com. 224. And see *Rowe v. Brenton*, 8 Barn. & Cres. 737. 756; S. C. 3 Man. & Ry. 133. 223.

(*s*) *The Prince's case*, 8 Co. 27, a., 3rd point. 21 Jac. 1. c. 29. 10 Geo. 2. c. 29. s. 9 33 Geo. 3. c. 78.

out issue, the title and estates, by virtue of a charter granted by King Edward the 3rd (*t*), and confirmed by parliament (*u*), devolve on the King's next son (*x*). Lord Coke's position to the contrary (*y*) is considered unsound (*z*). But, on the death of the eldest son leaving issue, the dukedom and inheritance, it seems, revert to the crown, it being requisite that the next son of the crown should also sustain the relative character of heir apparent to the throne (*a*), which cannot be the case during the existence of issue of his late elder brother (*b*). Nor can the eldest son of the eldest son succeed, because he is not the King's eldest son (*c*). The possessions of the duchy in like manner vest in the crown until the birth of a son (*d*).

Leases granted by the crown when invested with the possessions of the duchy were determinable at common law by an after-born son (*e*); but at various periods this obstacle to a secure tenancy has been removed by parliament (*f*); and an act passed in the reign of the late King, William 4th (*g*), provided, that during such time as the duchy of Cornwall should remain vested in his Majesty, it should be lawful for him from time to time, by warrant under his sign manual, to be countersigned by any three or more of the commissioners of the treasury, to authorise such of the regular officers of the duchy who by virtue of their several appointments were

(*t*) Com. Dig. Roy, (G).

(*u*) The Prince's case, sup.

(*x*) *Lomax v. Holmden*, 1 Ves. 294.
1 Bla. Com. 224. n. (10) by Christian.
Collins's proceedings on Baronies, p. 148.

(*y*) 3 Co. 30, a.

(*z*) See authorities in note (*x*), sup.

(*a*) The Prince's case, 3 Co. 26, b., 2nd point.

(*b*) Christian's note (10) to 2 Bla. Com. 224. Rot. Parl. 12 Ed. iv. No. 14.

(*c*) The Prince's case, 3 Co. 30, a. This will account for the act of parliament in 1759, 32 Geo. 2. c. 10, which enabled King George the 2nd to demise

the Duchy of Cornwall lands, though the Prince of Wales, his grandson, (afterwards George the 3rd,) was then of age. Frederick, the son of George the 2nd, died 20th March, 1750.

(*d*) Com. Dig. Roy, (G).

(*e*) *Ibid.* *Atkins v. Mountague*, 1 Ch. Ca. 215.

(*f*) 1 Car. 1. c. 2. 13 Car. 2. st. 2. c. 4. 22 Car. 2. c. 7. 25 Car. 2. c. 3. 12 & 13 W. 3. c. 13. 1 Anne, st. 1. c. 7. s. 8. 6 Anne, c. 25. 12 Anne, c. 22. 24 Geo. 2. c. 50. 33 Geo. 2. c. 10. 1 Geo. 3. c. 11. 3 Geo. 4. c. 78. 5 Geo. 4. c. 78.

(*g*) 1 & 2 W. 4. c. 5.

concerned in the general superintendence of the revenues and affairs of the duchy, being not more than five, and not less than three in number, to demise or lease, in his Majesty's name, and on his Majesty's behalf, by deed under the hands and seals of any two or more of them, all and every the manors, messuages, &c., parcels of the possessions of the duchy, or annexed to the same; provided that the lessees should execute a counterpart of the lease: and all such leases were declared to be good and effectual against the King, his heirs and successors, and against all other persons that should at any time thereafter have, inherit, or enjoy, the duchy by force of any act of parliament, or by other limitations whatsoever. And it was provided (*h*), that every such lease in possession should be made for three lives, or fewer, or for thirty-one years, or under, or for some term of years determinable upon one, two, or three lives, and not above; and if any such lease should be made in reversion or expectancy, then that the same, together with the estates in possession, should not exceed three lives, or the term of thirty-one years, and should not be in any wise dispunishable of waste; and so as there should be reserved the ancient or most usual rent or more, or such rent as had been reserved, yielded, or paid, for such of the premises as should be contained therein, for the greater part of twenty years next before the making of the lease, and should be reserved to such as should have the inheritance or other estate of the duchy: and where no such rent had been reserved or payable, that then upon every such lease or grant there should be reserved a reasonable rent, not being under the twentieth part of the clear yearly value of the manors, &c., contained in such lease.

It was also enacted (*i*), that it should be lawful for the officers of the duchy to be named in his Majesty's warrant, by deed under the hands and seals of any two or more of them, to demise any lands, &c., parcel of the duchy, or annexed to the same, for any term of years not exceeding the

(*h*) 1 & 2 W. 4. c. 5. s. 1.(*i*) 1 & 2 W. 4. c. 5. s. 2.

term of ninety-nine years, expressly for the purpose of improving the same by erecting substantial buildings thereon, or for the purpose of improving waste lands by cultivation, or otherwise; provided that the lessee should execute a counterpart of such lease; and that upon all such leases improved annual ground rents should be reserved and made payable; and that in all such cases of leases for terms exceeding thirty-one years, or exceeding the usual term determinable upon three lives, no fines or other consideration should be taken further or other than the improved annual ground rents by the act directed to be reserved. And further (*k*), that the terms and conditions of all leases to be made under the provisions of the act should be previously approved by the commissioners of the treasury, or any three or more of them. And (*l*) that all covenants, conditions, reservations, and agreements, contained in every such lease should be good and effectual, as well for and against them to whom the reversion of the said manors, &c., should come, as for and against them to whom the interest of such leases should come respectively, as if the King at the time of making such covenants, conditions, reservations, and agreements, had been seized of an absolute estate in fee-simple in the same manors, &c.

The fifth section contains a general saving to all persons, bodies politic and corporate, their heirs and successors, executors, administrators, and assigns, (other than the King, his heirs and successors, and other than the Duke and Dukes of Cornwall for the time being, and his and their heirs, their lessees, and all persons that should thereafter have, inherit, and enjoy, the said duchy of Cornwall by force of any act of parliament, or other limitation whatsoever,) of all such rights, titles, estates, &c., as they had or ought to have had before the making of the act, in as ample a manner as if the act had not been made.

This act was in the present reign (*m*) revived and continued

(*k*) Sect. 3

(*l*) Sect. 4.

(*m*) 1 & 2 Vict. c. 101.

for the time during which the duchy should remain vested in her Majesty; and on its provisions depends the stability of duchy leases granted by the late King or present Queen.

The powers of leasing enjoyed by the present Duke of Cornwall (whom God long preserve in health and happiness!) will bethe subject of future discussion.

The enrolment of a lease of lands parcel of the duchy of Cornwall is primary evidence of such lease, whether it be granted by a Duke of Cornwall, or by the crown when there is no duke (*n*).

5. With reference to hereditaments purchased by, or descended, or devised to, the crown.

Lands purchased by the crown out of the privy purse, or moneys not appropriated to any particular service, are not subject to the operation of 10 Geo. 4. c. 50, and 2 W. 4. c. 1. The doubts formerly entertained whether purchases of this description did not fall within the restrictions imposed by the acts of 1 Anne, st. 1. c. 7, 1 Geo. 3. c. 1, and 34 Geo. 3. c. 75, were removed by an act passed in the reign of George the 3rd (*o*), by which it was declared that none of the provisions and restrictions of those acts should extend to the purchases in question (*p*). And (*q*) that it should be lawful for the King, his heirs and successors, by any instrument under the royal sign manual, attested by two or more witnesses, to grant estates so purchased, whether of freehold, copyhold, customary, or leasehold tenure, and whether conveyed or assured to, or otherwise vested in, his Majesty, his heirs or successors, or to or in any person or persons in trust for him, his heirs or successors, to any person or persons, for any estate or estates, or for any intents or purposes, as any of his subjects might grant their estates: and his trustees were directed to convey the same as he should direct.

Lands which devolve on the crown by the gift or devise of,

(*n*) *Rowe v. Brenton*, 8 Barn. & Cres. 737. 755; S. C. 3 Man. & Ry. 133, 218.

(*o*) 39 & 40 Geo. 3. c. 83.

(*p*) Sect. 1.

(*q*) Sect. 4.

or by descent, or otherwise, from, any ancestors, or any other person or persons, not being Kings or Queens of this realm, are in like manner capable of free alienation, as if the same belong to private individuals (*r*).

But as the act last referred to did not extend to estates to which the King was entitled at the time of his accession to the crown, an act passed in the reign of George the 4th (*s*) provided, that all the powers given to the King, his heirs and successors, by 39 & 40 Geo. 3. c. 88, over the manors, messuages, &c., purchased or to be purchased by him or them, or coming to him or them in manner in that act mentioned, should be extended to all manors, and messuages, &c., whether of freehold, or copyhold, or customary, or leasehold tenure, whereof his Majesty, or any person or persons in trust for him, at the time of his accession, or whereof his heirs or successors, or any person or persons in trust for them, at the time of their respective accessions, was, were, or should be, seised and possessed, and which before such accession he or they respectively might have legally granted, sold, given, or delivered.

6. With reference to hereditaments forfeited, or escheated to the crown, or taken by the crown by reason of their having been purchased by, or to the use of, or in trust for an alien.

Lands taken by the crown by way of escheat or forfeiture are exempt from the operation of the acts 10 Geo. 4. c. 50, and 2 W. 4. c. 1. By the act of Queen Anne (*t*) also it was declared that nothing therein contained should disable her Majesty, her heirs and successors, to make any grant or restitution of any estate or estates thereafter to be forfeited for any treason or felony whatsoever, or to disable her Majesty, her heirs and successors, to grant, demise, or assign, any lands, tenements, or hereditaments, which should be seized or taken into her or their hands upon any outlawry, at

(*r*) Sects. 1 and 4.

(*s*) 4 Geo. 4. c. 13.

(*t*) 1 Anne, st. 1. c. 7. s. 3.

the suit of her or their subjects, as had been usual, or any estate whatsoever which was or should be seized, extended, or taken into execution, for any debt owing or to be due to the crown, as she or they should think fit.

The provisions of this act were extended by the 39 & 40 Geo. 3 (*u*). After reciting that divers lands, &c., had become, and might become, vested in his Majesty, his heirs and successors, by escheat or otherwise, in right of the crown, which, in the hands of subjects, would be chargeable with trusts, or applicable to certain purposes, and that his Majesty, his heirs or successors, might be desirous that the same should be applied accordingly, notwithstanding any right to hold the same discharged thereof, but that by reason of the provisions of the act of Anne, and the act of 34 Geo. 3 (*x*), doubts might be raised whether his Majesty, his heirs or successors, could direct such application thereof; and also after reciting that divers lands, &c., as well freehold as copyhold, had escheated, and might escheat, to his Majesty, his heirs or successors, for want of heirs of the persons last seised thereof, or entitled thereto, or by reason of some forfeiture, or otherwise, although not forfeited for treason or felony; and that it was expedient to enable his Majesty to direct the execution of any such trusts or purposes, and to make any grants of any such lands, &c., it was enacted (*y*), that it should be lawful for his Majesty, his heirs and successors, by warrant under the sign manual, to direct the execution of such trusts, and to make any grants of such escheated lands to any person or persons, either for restoring the same to any of the family of the person or persons whose estates the same had been, or of rewarding any person or persons making discovery of any such escheat.

A question having arisen whether the powers given by this act extended to hereditaments which had or might come to the crown in right of the duchy of Lancaster, or by reason that the same had been purchased by, or for the use of, any

(*u*) 39 & 40 Geo. 3, c. 88, s. 12.

(*x*) 34 Geo. 3, c. 75.

(*y*) 39 & 40 Geo. 3, c. 88, s. 12.

alien or aliens, it was enacted (*z*), that in all cases in which his Majesty, his heirs or successors, had, or should, in right of his crown, or of his duchy of Lancaster, become entitled to any freehold or copyhold manors, messuages, &c., either by escheat for want of heirs, or by reason of any forfeiture, or by reason that the same had been purchased by, or for the use of, or in trust for, any alien or aliens, it should be lawful for his Majesty, his heirs and successors, by warrant under the sign manual, or under the seal of the duchy or county palatine of Lancaster, according to the nature of the title to such manors, messuages, &c., respectively, to direct the execution of any trusts, and to make grants of such manors, messuages, &c., to any person or persons, for the purpose of restoring the same to any of the family of the person or persons whose estates the same had been, or of rewarding any person or persons making discovery of any such escheat, or of his Majesty's right and title thereto.

The statute 6 Geo. 4 (*a*) extended the provisions of these acts to leasehold premises vested in the crown by reason of any forfeiture, or by reason of their having been purchased by, or for the use of, or in trust for, an alien.

And the act of parliament (*b*) which, at the commencement of the present reign, transferred several of the hereditary rates, duties, payments, and revenues of the crown to the consolidated fund, expressly reserved (*c*) to the Queen her right of disposing of or leasing any freehold or copyhold property to which her Majesty, or any of her royal predecessors, had or should become entitled either by escheat, forfeiture, or by reason that the same had been or should be purchased by, or for the use of, or in trust for, any alien, subject nevertheless to all such restrictions and regulations as were in force by virtue of any act in relation thereto at the time of the decease of King William the 4th.

With regard to lands in Ireland, it was enacted by

(*z*) 47 Geo. 3. sess. 2. c. 24, and 59
Geo. 3. c. 94.

(*a*) 6 Geo. 4. c. 17. s. 1.

(*b*) 1 & 2 Vict. c. 2.

(*c*) Sect. 12.

10 Geo. 4 (*d*), that his Majesty, his heirs and successors, should have and enjoy the same powers with respect to any manors, messuages, &c., in Ireland, whether freehold or leasehold, which had since the passing of the act of 7 & 8 Geo. 4. c. 68 (*e*), or within two years prior thereto, or thereafter should, become vested in his Majesty, his heirs or successors, by escheat, or forfeiture, or by reason of their having been purchased by, or for the use of, or in trust for, any alien or aliens, as by the acts of 39 & 40 Geo. 3. c. 88, 47 Geo. 3. c. 24, 59 Geo. 3. c. 94, and 6 Geo. 4. c. 17, were given with respect to manors, messuages, &c., in England.

It was provided, however, by 10 Geo. 4 (*f*), that the provisions therein contained should not extend to any estates or possessions in Ireland which might be seized into the hands of the crown on writs of outlawry or other process between subject and subject, nor to any rents usually called *custodiam* rents reserved on leases granted under the Exchequer seal of such estates or possessions, nor to the *præ fines* or post fines, or other fines, or moneys payable on writs of entry, and writs of covenant, or on levying fines, or suffering common recoveries, in Ireland (*g*), nor to the lighthouse duties payable in Ireland.

And the statute, after reciting that it might be thereafter thought advisable to make some alterations with respect to the said *custodiam* rents, *præ* and post fines, and other fines, in Ireland, and that it was desirable, that, in the meantime, no gift, grant, or alienation thereof should be made, by which such alteration might be impeded or prevented, declared (*h*), that no gift, grant, alienation, lease, or other assurances whatsoever, should at any time thereafter be made by the King, his heirs or successors, of the said *custodiam* rents, or of the said *præ* and post fines, or other fines, or moneys, or

(*d*) 10 Geo. 4. c. 50. s. 127.

(*e*) 7 & 8 Geo. 4. c. 68, entitled "An Act for the management and improvement of the land revenues of the Crown in Ireland, and for other pur-

poses relating thereto."

(*f*) 10 Geo. 4. c. 50. s. 133.

(*g*) Fines and recoveries in Ireland were abolished by 4 & 5 W. 4. c. 92.

(*h*) 10 Geo. 4. c. 50. s. 134.

of any of them, but that all such gifts, grants, alienations, leases, or other assurances, should be *ipso facto* void, without any *scire facias*, inquisition, or other proceeding, to determine or make void the same (*i*).

But great alteration was made with regard to escheated or forfeited trust estates by 4 & 5 W. 4. c. 23, which provides (*k*), that no land (*l*) vested in any person upon any trust, or by way of mortgage, shall escheat or be forfeited to the crown, or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his co-trustee, or descend or vest in his representative, as if no such attainder or conviction had taken place. And, after reciting the expediency of relieving persons beneficially entitled to property already so escheated or forfeited, it is enacted (*m*), that where before the passing of the act any person possessed of land as a trustee shall have died without an heir, or been convicted of an offence whereby it has escheated or been forfeited, or become subject to escheat or forfeiture, the land shall be subject to the order, control, and disposition of the court of Chancery, for the use of the party beneficially interested, in such manner, under the provisions of the acts of 11 Geo. 4., & 1 W. 4. c. 60 (*n*), as if such person so dead without heir, or so convicted, were out of the jurisdiction of, or not amenable to, the process of the court, without having been so convicted: Provided that the act should not extend to any land then vested in any person by virtue of any grant made subsequently to the time when such escheat or forfeiture first occurred, or to any land which more than twenty years prior to the passing of the act had been actually vested in

(*i*) See 4 & 5 W. 4. c. 92, sup., p. 225. n. (*g*).

(*k*) 4 & 5 W. 4. c. 23. s. 3.

(*l*) Extending to any manor, messuage, tenement, hereditament, or real property, whether freehold, customary-hold, copyhold, or of any tenure whatever. Sect. 1.

(*m*) Sect. 6.

(*n*) Entitled "An Act for amending the laws respecting conveyances and transfers of estates and funds vested in trustees and mortgagees; and for enabling courts of equity to give effect to their decrees and orders in certain cases."

possession or reduced into possession by the party entitled thereto by virtue of any such escheat or forfeiture.

At a very early period it was customary for the crown to grant leases of lands escheated and seized into its hands under inquests of office to the party whose lands were seized, or other person claiming against the seizure (*o*) ; and the statute 36 Ed. 3 (*p*) seems to have established the right of such claimant to a lease in preference to all others. "If there be any man," says the act, "that will make claim or challenge to the lands so seized, that the escheator send the inquest into the Chancery within the month after the lands so seized, and that a writ be delivered to him to certify the cause of his seisin into the Chancery, and there he shall be heard without delay to traverse the office, or otherwise to show his right, and from thence sent before the king to make a final discussion, without attending other commandments. And in case that any come before the chancellor, and show his right, by any showing by good evidences of his ancient right and good title, the chancellor, by his good discretion and advice of counsel, (if it seem expedient to him to have counsel,) shall let and demise the lands so in debate to the tenant, yielding thereof to the King the value, if it pertain to the King, in the manner as he and other chancellors before him have done in times past of their good discretion, so that he find surety that he shall do no waste nor destruction till it be judged."

This statute, however, did not preclude the King from granting such lands to strangers before the return of the inquisition, and before the party forfeiting could make his claim (*q*). To prevent, therefore, this oppressive encroachment on the rights of the subject, the legislature again interfered, and provided (*r*), "that no lands nor tenements seized into the hand of the King upon such inquest taken before the escheators or commissioners should be let or

(*o*) Stanf. Prerog. 67, b.

(*p*) 36 Ed. 3. stat. 1. c. 13.

(*q*) Stanf. Prerog. 68, b. 12 East, 114.

(*r*) 3 Hen. 6. c. 16. And see 13 Hen. 6. c. 7.

granted to ferm by the chancellor, or treasurer of England, or any other the King's officer, until the same inquests and verdicts should be fully returned in the Chancery or in the Exchequer; but that all such lands and tenements should remain in the hands of the King until the said inquests and verdicts should be returned, and by a month after the same return, unless he or they who should feel them grieved by the same inquests or putting out of their lands or tenements should come into the Chancery (s), and proffer themselves to traverse the said inquests, and then offer to take the same lands or tenements to ferm; and if they should do so, that then the same lands or tenements should be committed to them, if they should show good evidence proving their traverse to be true after the form of 36 Edw. 3; to hold until the issue taken upon the same traverse should be found and discussed for the King, or for the party, finding sufficient surety to pursue the said traverse with effect, and to render and pay to the King the yearly value of the lands whereof the traverse should be so taken, if it should be discussed for the King. And that if any letters patents of any of the lands or tenements should be made to the contrary to any other person, or let to ferm within the said month, after the said month of return they should be holden for none."

Ten years afterwards, another act (t) was passed, which, after reciting that last noticed, and stating, "the which good statute and ordinance divers persons devising to subvert, and by their subtilty to serve as for no purpose, have sued to obtain such gifts and grants and fermes by the King's letters patents before any inquisition or title found for the King of the same, pretending such gifts and grants not comprised nor remedied by the said statute, notwithstanding that it is in like mischief of the said statute," provided, that no letters patents should be made to any person or persons of any lands or tenements before inquisition of the King's title in the same

(s) This was because when an office was necessary to entitle the King, the commission issued out of Chancery, 5

Rep. 52, a. 12 East, 111.

(t) 18 Hen. 6. c. 6. And see 23 Hen. 6. c. 17. 2 Dy. 145, b. pl. (66).

should be found in the Chancery or in his Exchequer returned, if the King's title in the same should not be found of record, nor within the month after the same return, if it should not be to him or them which should tender their traverses; and that if any letters patents should be made to the contrary, they should be void and holden for none.

Notwithstanding the statute of 8 Hen. 6. c. 16, it appears that "divers escheators and commissioners (*u*) which had taken such inquests after the death of the King's subjects, of their covin, to the intent to put them that had cause of traverse to the verdicts of the said inquests from the ferm of the premises, would in the time of vacation put into the Chancery or into the Exchequer their said offices by them taken, because the month should pass before the beginning of the term next ensuing, by reason whereof they that should of right have had the ferm upon their traverse, according to the true intent of the said statute, were put from the same fermes contrary to right and good conscience:" it was therefore enacted (*x*), that from thenceforth, after such office found afore any escheator or commissioner, and put into Chancery or the Exchequer, if any person or persons which would tender a traverse to the same office, and desire to have the lands contained in the same office to ferm, and find surety, and show evidence to the chancellor of England for the time being according to the statute of 8 Hen. 6, should come into the Chancery within three months next after the same office so put into the Chancery or Exchequer, that he should be then by the said chancellor thereto admitted, and that all other patents or grants thereafter to be made thereof within the said three months ended should be void.

The object of the legislature, therefore, plainly was, in all cases in which the King's title did not appear upon record to open the possession to whoever could claim against the King till the final decision of the right; and that any grant to obstruct him should be void (*y*).

(*u*) 1 Hen. 8. c. 10. s. 2.

(*x*) Sect. 3.

(*y*) Doe dem. Hayne v. Redfern, 12 East, 111. 112.

The lease made to the traverser was not of any certain duration; but, according to the terms of the statute, *donec discussum fuerit*. And, therefore, where the traverse was found against him that tendered it, the lease became void without further process (*z*).

With respect to the security required on the traverse of an inquisition (*a*), it was the usual course of the court to take it to the value of two years' profits of the land, because it was supposed that in that time the right of the crown and party would be determined (*b*).

As it frequently happened that tenants for years in possession of lands seized under inquisitions of office were deprived of their terms in consequence of their interests not being found in the inquisitions, and as they had no means at common law of recovering their interests during the King's possession, either by way of traverse, *monstrans de droit*, or otherwise, on account of their being a chattel, and not a freehold, it was enacted (*c*), that where any such office or inquisition should be found, omitting such interests, the tenant for term of years should enjoy his term in such manner as he could have done in case there had been no such office or inquisition found, and as he lawfully would have done in case such lease had been found in such office or inquisition.

Where a party makes discovery of an escheat, it is the ordinary rule for the crown to grant him as good a lease as it can give (*d*).

7. With reference to other requisites and matters of form connected with crown leases.

In former times, as we have seen (*e*), letters patent under the great seal were the ordinary medium of conveyance or demise by the crown (*f*). The great seal, however, was not indispensable, for it was the frequent usage of the court

(*z*) Stanf. Prerog. 63, a. b.

(*a*) See ante, p. 223, & 229.

(*b*) Rex v. Barlow, Bumb. 25.

(*c*) 2 & 3 Ed. 6. c. 3, ss. 1, 3.

(*d*) Moggridge v. Thackwell, 7 Ves. 71.

(*e*) Ante, p. 135.

(*f*) Brett v. Cumberland, 3 Bulstr. 164. Mo. 476. pl. 631.

of Exchequer, though in contravention of the common law, by which no grant of any land by the King was available or pleadable but under the great seal, to make such leases under their own seal, without any distinction between freehold and chattel terms (*g*).

In pleading such leases under the Exchequer seal, the lessee was not obliged to allege any usage or prescription to warrant the practice (*h*), the customs of the King's courts, which of themselves constitute a new law, superseding in these respects the usual course of the common law (*i*), and being cognisable in every court at Westminster (*k*). Indeed, in every commission to make leases under the great seal, there used to be a special grant that leases made by the commissioners under the seal of the Exchequer, &c., should be good; though, as Lord Coke observes (*l*), unless the leases were good for the causes mentioned by him, the clause in the commission would not remedy them.

Much of the difficulty and expense attending the common law mode of granting crown lands under the great seal or Exchequer seal has, as we have seen, been abolished by the statutes cited in this division; but still, when granted by the King, it is not to be forgotten that leases demand the draftsman's anxious care and attention.

The lessee must be accurately named, as a misnomer will prove fatal to the lease (*m*).

Generally speaking, it is necessary to recite existing leases which are of record (*n*). If a new lease be granted even to the lessee in possession, his former one must be recited,

(*g*) Lane's case, 2 Co. 16, b.; S. C., nom. Smith, or Smyth, *v.* Cave, 1 And. 191; 1 Leon. 170; Gouldsb. 34. Cro. Car. 528. Kemp *v.* Barnard, Cro. Car. 513. March, 55, pl. 85. Predyman *v.* Wodry, Cro. Jac. 109. Rol. Ab. Court, (B) pl. 4. Prerogative, (C), and (E), pl. 3, p. 182.

(*h*) Lane's case, sup. Rol. Ab. Court, (B), pl. 4.

(*i*) Ibid.

(*k*) Ibid.

(*l*) Lane's case, 2 Co. 17, a.

(*m*) 10 Co. 112, a.

(*n*) Wing *v.* Harris, Cro. Eliz. 231; S. C., nom. Harris *v.* Wing, 3 Leon. 242; cited, Mo. 415. Fulham *v.* Fulham, March, 206. Glover *v.* Clossey, 2 Rol. 130. Com. Dig. Grant, (G. 10). Anon. Sav. 53, case 126. 17 Vin. Ab. 103. Prerogative, (Q. b). Alcock *v.* Cooke, 5 Bing. 340-9; S. C. 2 Mo. & Pa. 625.

otherwise the grant will be void (*o*), and the first lease extinguished (*p*).

There are some exceptions to the rule; for instance, if the King make a lease at will, and afterwards grant the same land to another, the lease at will need not be recited (*q*). So, if he lease a copyhold, and afterwards grant the same land to another (*r*).

The necessity for recitals of existing leases may also be dispensed with by an express clause in the patent (*s*).

Where recitals are inserted, it is not necessary to particularise, by dates or otherwise, such leases of record as may be in *esse*, provided they be so noticed as to remove all appearance of deceit. Indeed, they may be referred to in very general terms. If, for example, the King grant the land without any recital of an existing lease, but with the words "notwithstanding it be in lease for life or years, of record or otherwise"; or if he grant the land, and further grant "the reversion of it dependent or expectant upon any estate for life or for years," in both these cases the grant is good (*t*). A mistake even of the date will not vitiate the grant (*u*).

Existing leases not upon record, which by intendment cannot be known nor discovered, need not be recited (*x*). And, therefore, if an individual grants a lease, and the reversion afterwards comes to the King, who grants it to another, as the subject cannot with certainty be acquainted with the existence of the previous lease, the want of its being recited will not vitiate the King's grant (*y*).

Great caution and accuracy are required in framing other

(*o*) Wing v. Harris, sup.

(*p*) Ibid. But the law on this point is different where the lease is between subject and subject. Wilson v. Sewell, 4 Burr. 1980; S. C. W. Blac. 617.

(*q*) Com. Dig. Grant, (G. 10.).

(*r*) Com. Dig. Grant, (G. 10.). 2 Rol. Ab. Prerogative, (G). pl. 3.

(*s*) Finch v. Risley, Poph. 25. 30; S. C. 2 Leon. 131. Anon. 1 And. 46. Brook

v. Goring, Cro. Car. 197. Hob. 229.

(*t*) Bozoun's case, 4 Co. 35, b.; S. C., nom. Futter v. Boorome, Godb. 35, numbered 39 by mistake.

(*u*) Bro. Ab. Patent, pl. 96.

(*x*) Aprice v. Hayes, Hardr. 496-9. Fulham v. Fulham, March, 206. 1 Co. 15, a. Alcock v. Cooke, 5 Bing. 340. 319; S. C. 2 Mo. & Pa. 625.

(*y*) Alcock v. Cooke, sup.

recitals in leases by the King; for, generally speaking, if it appear on the face of the grant that he is mistaken or deceived either in matter of fact or matter of law, as in the case of false suggestion, misinformation, or misrecital of former grants, the lease is absolutely void (*z*). To prevent deceit upon the crown, it was enacted, at an early period, that unless parties demanding lands or tenements of the King made express mention in their petitions of the value of the things demanded, the patent should be void (*a*).

The difference is, where the king is deceived in his intent, and where he is mistaken in his information; for if he grant the manor of D., "heretofore demised for 10*l*," where it was really demised for 20*l*., and 20*l*. be reserved, the grant is good (*b*). But if the lease recite that the lands were let for a less sum than was actually paid for rent, and the smaller sum be reserved, the grant is void; the smallness of the value seeming to be the ground of the patent (*c*). It is also void if the grantee suggest that the land came to the King by forfeiture, when in fact it belonged to him in right of his crown (*d*).

On the same principle, if the consideration, which is for the benefit of the crown, be it executed or executory, on record or not on record, be false or not duly performed, or if prejudice may accrue to the crown by reason of non performance of it, as if a new lease be granted in consideration of the surrender of a former one, and the alleged surrender be inoperative (*e*), or operative in part only (*f*), or conditional (*g*), or if the former lease were void (*h*); in either of these cases the grant is void. But to render a new grant available, an

(*z*) 2 Bla. Com. 348. *Aprice v. Hayes*, Hardr. 498.

(*a*) 1 Hen. 4. c. 6.

(*b*) *Chambers v. Mason*, Yelv. 48; S. C. Yelv. 42; Cro. Jac. 34.

(*c*) *Mason v. Chambers*, Cro. Jac. 34; S. C. Yelv. 42. 47.

(*d*) 2 Rol. Ab. Prerogative, (N). pl. 3.

(*e*) *Barwick's case*, 5 Co. 93, b.;

S. C., nom. *Berwick's case*, Mo. 393.

Anon. 3 Dy. 352. pl. (26). *Sawier, or Sawyer, v. East, Lane*, 74. 109; S. C. 2 Rol. Ab. Prerogative, (N). pl. 4. p. 188. (Q). pl. 1. p. 189.

(*f*) *Sawier, or Sawyer, v. East*, sup.

(*g*) 2 Rol. Ab. Prerogative, (M). pl. 6.

(*h*) *Barwick's case*, 5 Co. 94, a.

actual surrender of the existing interest by deed is not required; a surrender in law by acceptance of a new estate being sufficient (*i*). So, if the King's grant recite a lease in possession, and afterwards grant the reversion, the grant will be nugatory, should it be shown that the supposed lease was void (*k*); or if the King grant a lease to B., to hold for twenty-one years after the end of the term granted to A., and A.'s term had been previously forfeited to the crown, B.'s lease cannot be supported (*l*).

And it seems that a lessee under a lease obtained upon untrue surmises cannot find relief in Chancery even against the crown's grantee (*m*).

If a sum of money form the consideration, or part of the consideration, and be acknowledged by the King to have been paid, it is not necessary for the grantee to prove payment in order to support the lease (*n*). So, it seems, if the lease be granted in consideration that the lessee shall repair, his neglect to do so will not annul it, as the King may maintain an action of covenant against him for damages (*o*).

If the parcels be once described with sufficient certainty, the lease cannot be impeached by the addition of superfluous matter which proves untrue (*p*); as in the case of a demise of a manor by special name, with a superadded false description of its having lately been in the occupation of J. S. In this, and similar cases, the King is not deceived in his title, nor in the value which he intends to grant, nor in the restraint which, for his profit, he intends to make (*q*). But if the lease

(*i*) The case of the Churchwardens of Saint Saviour Southwark, 10 Co. 66, b.

(*k*) Bozoun's case, 4 Co. 35, b.; S. C., nom. *Futter v. Boorome*, Godb. 35, numbered 39, by mistake.

(*l*) *Holt v. Roper*, 3 Leon. 5.

(*m*) *Cary*, 45. And see *Hungerford's case*, 1 Leon. 30.

(*n*) The case of the Churchwardens of Saint Saviour Southwark, 10 Co. 66, a. 67, b., 3rd resolution. 2 Rol. Ab. Prerogative, (M). pl. 3.

(*o*) 2 Rol. Ab. Prerogative, (M).

pl. 7. *Sawier, or Sawyer, v. East*, sup.

(*p*) *Legat's case*, 10 Co. 113, a. *Heidon v. Igrave*, 3 Leon. 162. And see *Anon. Mo.* 45. pl. 137. *Cro. Car.* 543. 1 Dy. 87. pl. (101). *Hob.* 171. *Doddington's case*, 2 Co. 32, b.; S. C., nom. *Hall v. Peart*, Poph. 60. *Mason v. Chambers*, *Cro. Jac.* 34; S. C. *Yelv.* 42. 47. *Plowd.* 191, b. *Doe dem. Ashforth v. Bower*, 3 Barn. & Adol. 453. *Doe dem. Smith v. Galloway*, 5 Barn. & Adol. 43; S. C. 2 Nev. & Man. 240.

(*q*) *Ibid.*

be made of so many acres of an estate as were lately in the occupation of J. S., his occupation of the premises is of the substance of the description; and if J. S. never occupied them, the grant is void (*r*).

If the King having a hundred acres of land in D. grant twenty acres generally, without describing them by the rent, occupation, or name, the grant is void; and the grantee shall not have his election to take any twenty of the acres (*s*); though a different rule prevails in the case of a grant by a subject (*t*).

In a late case (*u*), a lease granted by the crown of all mines in the province of Nova Scotia was held to include mines in the island of Cape Breton.

Rents reserved on leases of crown lands are usually reserved to her Majesty, her heirs and successors, and made payable into the hands of her Majesty's bailiff or receiver-general for the time being of the premises. Rents are reserved to the commissioners of the woods and forests only when so directed by particular acts of parliament.

If a lease be made without appointing any place for payment, or any person to receive the rent, the lessee may, at his election, pay it at the Exchequer or to the bailiff or receiver (*x*). Though the clause reserve the rent payable "at the receipt of the Exchequer at Westminster," it is not necessary that the receipt be held at Westminster, for if held at another place, the rent must be paid there; as the law in this particular implies not only that which is expressed, viz., at Westminster, but more, viz., at whatsoever other place the receipt may be kept.

As to the proviso for annulling the lease on non-payment

(*r*) *Bozoun's case*, 4 Co. 35, a. 36, a.; S. C., nom. *Futter v. Boorome*, Godb. 35, [for 39]; 2 Rol. Ab. Prerogative, (Z), pl. 2. *Heidon v. Ibgrave*, 3 Leon. 162. *Doddington's case*, 2 Co. 32, b., 1st resolution; S. C., nom. *Hall v. Peart*, Poph. 60. Plowd. 191, b.

(*s*) *Stockdale's case*, 12 Co. 86. *Hungerford's case*, 1 Leon. 30, pl. 36.

Dav. 45, a. 1 W. Blac. 118.

(*t*) *Ibid.*

(*u*) *Taylor v. The Attorney-General*, 8 Sim. 413.

(*x*) *Borough's case*, 4 Co. 73, b.; S. C., nom. *Burrough v. Taylor*, Cro. Eliz. 462, the second page of that number; Mo. 404; Gould. 124. Dy. 87.

of rent or non-performance of covenants, the 27th section of the act of 10 Geo. 4. c. 50, provides, as we have seen (*y*), that every lease of premises subject to its operation must contain a clause for re-entry on non-payment of the rent, or non-performance of the lessee's covenants; but, with regard to such cases as are not comprised within that statute, or not otherwise provided for, a preferable mode may be adopted with a view to save the trouble and expense of an inquisition of office.

It is a rule that where a subject, to avoid a lease, would be put to an entry, the crown must have an inquisition of office (*z*), unless the fact of non-payment appear already on record, as was the case when the rent was made payable at the receipt of the Exchequer (*a*); for it would be fruitless to make that appear upon record by office which already so appears without (*b*): and, therefore, in the case of a lease for years, it seems advisable that the proviso should make it absolutely determine on non-payment of rent or non-performance of the conditions, instead of making it determinable by entry only (*c*), as in the latter case an office would be necessary (*d*).

If the rent be made payable to the Queen's receiver or his deputy, the fact of non-payment would not appear of record, and consequently the lease would not be void without office (*e*).

The rigour, however, of the common law with respect to forfeitures of leases granted by the crown was relaxed in the reign of King James the 1st, when an act (*f*) was passed, providing, that if any person or body politic or corporate, having any manors, lands, &c., by virtue of any original

(*y*) Ante, p. 194.

(*z*) Finch v. Risley, Poph. 25. 27. 53; S. C., nom. Finch v. Throckmorton, Mo. 291; Cro. Eliz. 220. 1 And. 303. 2 Leon. 134. 6 Com. Dig. Prerogative, (D 67). Staunf. Prerog. 55, b.

† (*a*) Lately regulated by 4 & 5 W. 4. c. 15. s. 9.

(*b*) Finch v. Risley, sup. Stephens v. Potter, Cro. Car. 100. Doe dem.

Hayne v. Redfern, 12 East, 113.

(*c*) Ibid.

(*d*) Ibid. Knight's case, 56, b., 5th resolution; S. C. 1 And. 173; 3 Leon. 124; Mo. 199. Anon. Sav. 70. pl. 145.

(*e*) Stephens v. Potter, sup. Doe dem. Hayne v. Redfern, sup. And see Marke v. Johnson, T. Raym. 137.

(*f*) 21 Jac. 1. c. 25.

lease, or assignment, made by the King, or any of his predecessors, or to be made by any of his successors, for any number of years, for life, or lives, or other estate, whereupon any rent service or any duty was or should be reserved, with any condition of re-entry, cesser, or to be void for default of payment or performance, should make any default therein, and yet after such default such rent service or other duty should be answered, paid, or done, before any advantage of such forfeiture or cause of forfeiture should be taken, and before any commission awarded to inquire, or other process issued touching the said forfeiture or non-payment of rent, then no advantage should be taken by his Majesty, his heirs or successors, of any such forfeiture or cause of forfeiture. And further (*g*), that no person claiming, or which afterwards should claim, from his Majesty, or any of his predecessors or successors, at any time after such cause of forfeiture, should take advantage of such default; but that every such estate forfeited or forfeitable by means of such default should be adjudged to continue as if no such default or cause of forfeiture had been had or made.

A demand on the part of the Queen is unnecessary to enable her to take advantage of a forfeiture for non-payment (*h*), unless the lands form parcel of the possessions of the duchy of Lancaster (*i*); and even then it is apprehended that a demand may be dispensed with if there be half-a-year's rent due, and no sufficient distress can be found on the demised premises (*k*).

If the Queen's lessee hold over after the determination of his lease, he is liable to an information filed in the Exchequer by the attorney-general, on behalf of the crown (*l*).

It remains to add that the usual disabilities of infancy do not extend to the crown (*m*).

(*g*) Sect. 3.

(*h*) 2 H. 7. 8. [B] 25. Borough's case, 73, a., 2nd resolution. Bro. Ab. Prerogative, pl. 101.

(*i*) Bonnye's case, Mo. 149. 154; S. C. cited, Mo. 161.

(*k*) 4 Geo. 2. c. 23. The provisions

of this statute will be discussed in a future Chapter.

(*l*) 3 Bla. Com. 261.

(*m*) Co. Lit. 43, b. 7 Co. 10, a. Alcock v. Cooke, 5 Bing. 340; S. C. 2 Mo. & Pa. 625.

III.—*Ecclesiastical and Eleemosynary Corporations.*

By the common law, spiritual corporations sole, as archbishops, bishops, deans, archdeacons, prebendaries, canons, parsons, and vicars, without the consent or confirmation of any other person, were capable of granting leases of their church lands for any term co-durable with their own personal enjoyment, but for no longer time (*n*). By obtaining the consent or confirmation of certain persons appointed by law (*o*), they would exercise unlimited powers of alienation (*p*), or incumber their glebe with leases or charges to take effect after their decease (*q*).

Deans and chapters, and other spiritual corporations aggregate, without the consent or confirmation of the bishop, or any other person, might also exercise the same unqualified rights of ownership and disposition over their church estates: nor is there any instance of a lease by ecclesiastical persons having been set aside on account of the length of time for which it was granted (*r*).

The same privilege was enjoyed by certain eleemosynary corporations aggregate, as the master and fellows of colleges, and masters or guardians of hospitals and their brethren (*s*).

Thus continued the rights of the clergy and eleemosynary corporations, till repeated experience of the hardships to which this state of the law gave birth called aloud for alteration; and the consequence was, an extension, on the one hand, of the alienative power enjoyed by some spiritual bodies, while, on the other, as regards both spiritual and eleemosynary corporations, the salutary control of parliament was exercised in confining within more reasonable limits the latitude of leasing allowed by the common law. Hence originated the enabling and restraining statutes.

(*n*) 2 Bla. Com. 318. 321.

(*o*) The doctrine of consent or confirmation will be discussed hereafter.

(*p*) Grindal's case, 4 Leon. 73.

(*q*) *Spendlowes v. Burket*, Hob. 7.

Anon. 1 Dy. 69, a. pl. 30.

(*r*) *Attorney-General v. Moses*, 2 Madd. 308.

(*s*) Co. Lit. 44, a.

The enabling statute of Henry the 8th (*t*) empowered all persons seized of any estate of inheritance in right of their churches, parsons and vicars excepted (*u*), to grant leases of their church-lands for twenty-one years or three lives at the most, upon the observance of certain conditions, which have already been enumerated and explained (*x*).

Prebendaries, although seized in right of their prebends, and not in right of their churches (*y*); precentors (*z*); chancellors of cathedrals (*a*); and treasurers of churches (*b*); were allowed to avail themselves of the privileges conferred by the statute, which, it is observable, did not extend to ecclesiastical or eleemosynary corporations aggregate (*c*).

It has lately been doubted by the court of Queen's Bench whether a perpetual curate is within the act of 32 Hen. 8; but the judges agreed that if he were within the first section, he was also within the exception contained in the fourth (*d*).

The common law rights, however, of the persons thus enabled remained unaltered; the statute invested them with a new power, but neither annulled nor abridged their former capacity to lease (*e*). With a view, therefore, to check the unreasonable advantage taken of that capacity by spiritual and eleemosynary bodies, to the impoverishment and injury of their successors, the restraining statutes were passed.

By the first of these statutes (*f*), all gifts, grants, &c., by any archbishop or bishop of any hereditaments parcel of the

(*t*) 32 Hen. 8. c. 28.

(*u*) Sect. 4.

(*x*) Ante, p. 66, *et seq.*, under "Leases by Tenants in Tail."

(*y*) *Aston v. Pitcher*, 4 Leon. 51. *Ensden v. Denny*, Palm. 106. *Watkinson v. Man*, Cro. Eliz. 350. *Bisco*, lessor de *Strode v. Holte*, 1 Lev. 112; S. C., nom. *Bis v. Holt*, 1 Sid. 153; S. C., nom. *Bill dem. Stroud v. Holt*, 1 Keb. 576. *Gibs. Codex*, 767.

(*z*) *Ensden v. Denny*, sup. *Bisco v. Holte*, sup. In *Bisco*, lessor de *Strode v. Holte*, 1 Lev. 113, *Hyde* said, that precentors of old foundations were enabled by the statute, but otherwise perhaps of new foundations; and, a

case in the Exchequer being cited that leases made by the chanters of Pauls ought to be confirmed, he said, that they were not properly chanters, but of the lesser order, and only singing men; but chanters, precentors, &c., were of the greatest order.

(*a*) *Bisco v. Holte*, sup.

(*b*) *Watkinson v. Man*, sup. And see *Bisco v. Holte*, sup.

(*c*) *Bacon on Leases*, p. 41.

(*d*) *Doe dem. Richardson v. Thomas*, 9 Adol. & Ell. 556; S. C. 1 Per. & Dav. 573.

(*e*) *Bunny v. Wright*, 1 Leon. 59.

(*f*) 1 Eliz. c. 19. s. 5.

possessions of his archbishopric or bishopric, to any person or body politic or corporate, other than to the Queen, her heirs or successors, whereby any estate might pass from the same archbishops or bishops, other than for the term of twenty-one years or three lives, from such time as any such lease, grant, or assurance, should begin; and whereupon the old accustomed yearly rent or more should be reserved and payable during the said term of twenty-one years or three lives, were declared to be utterly void. Thus, archbishops and bishops were restrained from disposing of their ecclesiastical possessions, whether with or without confirmation, otherwise than for twenty-one years or three lives, except to the Queen, her heirs or successors. By means of this saving, which it is admitted was necessary to exclude the crown from the operation of the act (*g*), the Queen obtained numerous leases, ostensibly for the support of her royal dignity, but in reality with intent to transfer them to her favourite subjects (*h*), until the abuse of the privilege occasioned its abolition; for we find that, in the first year of the reign of King James the 1st, an act (*i*) was passed which debarred every archbishop and bishop for ever from doing any act whereby any of their ecclesiastical lands, &c., should be demised or conveyed to the King, his heirs or successors (*k*). This enactment appears to have gone further than was intended, for it deprived archbishops and bishops of the power of granting to the crown, and the crown of the power of taking, even leases for three lives or twenty-one years. It is observable that deans and chapters, and others having ecclesiastical livings, were not included in the act, having been previously restrained by the statute, 13 Eliz. c. 10, from granting more extensive leases to the crown than to the subject (*l*).

(*g*) Case of Ecclesiastical persons, 5 Co. 14, b. Jenk. Cent. 255, case, 48.

(*h*) Magdalen College case, 11 Co. 71, b.

(*i*) 1 Jac. 1. c. 3.

(*k*) By the late act of 5 & 6 Vict. c. 103, archbishops and bishops, amongst

other ecclesiastical corporations sole, are empowered to grant leases for long terms of years, for building and improving purposes, to any person, including (sect. 31) the Queen's Majesty. See post, p. 258.

(*l*) 11 Co. 75, b.

The restrictions of the statute of 1 Eliz. c. 19, which applied, as we have seen, to archbishops and bishops only, were extended by 13 Eliz. c. 10 (*m*) to masters and fellows of colleges, deans and chapters of cathedral or collegiate churches, masters or guardians of hospitals, parsons, vicars, or any others having any spiritual or ecclesiastical living, who were thereby restrained from leasing lands, &c., parcel of the possessions of such college, &c., "other than for the term of one-and-twenty years or three lives, from the time as any such lease or grant should be made or granted, whereupon the accustomed yearly rent or more should be reserved, and payable yearly during the term."

As this act contains no exception in favor of the Queen, leases made to the crown in contravention of its provisions, unless saved by any of the enabling acts after mentioned, are as inoperative as leases to common persons (*n*).

The statute of 13 Eliz. c. 10, is not to be construed as making good any lease by any such college or collegiate church within the universities of Oxford or Cambridge, or elsewhere within the realm of England, for more years than are limited by the private statutes of the same college (*o*).

The words "master or guardian of any hospital," mentioned in the act of 13 Eliz. c. 10, s. 3, were afterwards declared (*p*) to be intended and meant of all hospitals, maisons dien, bead-houses, and other houses ordained for the sustentation or relief of the poor, and to be so expounded, declared, and taken for ever. The act, indeed, has always been construed beneficially to prevent all inventions and evasions against its true intention (*q*); and whether the college be incorporated by the name of "master and fellows," or by the name of "warden and fellows," or "warden and scholars," or "warden, fellows,

(*m*) 13 Eliz. c. 10. sect. 3.

(*n*) Case of Ecclesiastical persons, 5 Co. 14, a. Magdalen College case, 11 Co. 72, b. The general words of the act of 18 Eliz. c. 11, did not enable such ecclesiastical persons to make leases or estates to the crown as were

disabled by the act of 13 Eliz. c. 10. See 5 Co. 15, b. 11 Co. 76, a.

(*o*) Sect. 4.

(*p*) 14 Eliz. c. 14.

(*q*) 5 Co. 14, b. 11 Co. 76, a. Palm. 216.

and scholars," or "master, fellows, and scholars," or "master and scholars," or "provost, fellows, and scholars," or by any other name of corporation, and whether it be temporal, as for the advancement of the liberal arts and sciences, or for the education of youth in good literature, or ecclesiastical, or mixed, is immaterial, for every such college is within the provision of the act: and, in like manner, the words "masters or guardians of hospitals," mentioned in the act, extend to every kind of hospital, whether it be incorporated by any other name, or be a sole corporation, or a corporation aggregate of many (*r*).

And it has lately been held (*s*), that the recitals in the act of 13 Eliz. c. 10, do not limit the force of the subsequent enactment to cases in which the mischief by the alienation is done to the personal interest of the successor of the alienor; it being evident from the enactment that the legislature intended to apply the prohibition to the case of persons who were seised either as mere trustees, or in a great measure as trustees, and, among other persons, to the master or guardian of a hospital.

In the succeeding year (*t*), it was deemed expedient to remove the restriction as to leases of any houses belonging to the persons or bodies politic or corporate mentioned in the act of 13 Eliz. c. 10, and any grounds to such houses appertaining, where the houses were situate in any city, borough, town corporate, or market town, or the suburbs of any of them; the object of the legislature being to render those places more populous (*u*); and it was declared, that all such houses and grounds might be demised, as by the laws of the realm, and the several statutes of the said colleges, cathedral churches, and hospitals, they lawfully might have been before the making of the statute of the 13th of Eliz., or lawfully might have been if the said statute were not; so that such house should not be the capital or dwelling-house

(*r*) 11 Co. 76, a. The Attorney-General v. Glyn, 12 Sim. 34, 37. Dean and Chapter of York v. Middleborough, 2 Yo. & Jerv. 196. Grumbrell v. Roper, 3 Barn. & Ald. 711.

(*s*) Dean and Chapter of York v. Middleborough, *sup*.

(*t*) 14 Eliz. c. 11. Crane v. Taylor, Hob. 269.

(*u*) Per Twissden, J., 1 Vent. 245.

used for the habitation of the persons therein aforesaid, nor have ground to the same belonging above the quantity of ten acres; and provided (*x*) that the lease should not be made in reversion; nor without reserving the accustomed yearly rent at the least; nor without charging the lessee with the reparations; nor for any longer term than forty years at the most. This act, as it applied only to persons within the statute of 13 Eliz. c. 10, effected no alteration of the power of leasing enjoyed by archbishops and bishops.

It is particularly observable that the act of 14 Eliz. c. 11, excepts from the operation of 13 Eliz. c. 10, leases of property in any city, borough, &c.; but does not contain any terms importing the avoidance of any lease whatever; and although the 19th section of 14 Eliz. c. 11, enacts, that no lease shall be permitted to be made by force of the act in reversion, there are no words added to declare leases made contrary to such permission void; and, therefore, taking that act by itself, the court of Common Pleas in a late case (*y*) did not feel itself warranted to hold that such words could defeat and avoid an estate, when they might be satisfied by allowing them to give a right of action to the successor. But they said that the statutes of 13 Eliz. c. 10, 14 Eliz. c. 11, and 18 Eliz. c. 11 (*z*), ought to be read together as forming one law on the same subject-matter, and that it might, therefore, be well held, that where leases of houses, &c., which were exempted out of the 13 Eliz. c. 10, by the 14 Eliz. c. 11, did not observe the provisions of the latter statute, they fell within the general enactments of the first statute, and were made void thereby: in other words, that a lease not warranted by the 14 Eliz. was restrained by the 13 Eliz., which made leases against that act void (*a*). In the case cited, it was determined that a lease by a vicar of houses in London, for twenty-one years from the date, (not comprising the vicarage-house, and the

(*x*) Sect. 19.

2 Hodg. 255.

(*y*) *Vivian v. Blomberg*, 7 Sim. 548;
S. C. 3 Bing. N. C. 311; 3 Scott, 681;(*z*) *Noticed post*, p. 244.(*a*) *Vivian v. Blomberg*, *sup.*

ground demised being less than ten acres,) granted whilst a former lease in the premises for forty years was in existence, but which had less than three years to run, was binding on the successor of the grantor, as it was expressly sanctioned by the 18th of Eliz. c. 11, and was not avoided by the 13th.

The frequent evasions of the spirit of the act of 13 Eliz. c. 10, by means of new leases made long before the expiration of those already existing (*c*), occasioned the statute of 18 Eliz. c. 11, which, after reciting the 3rd section of 13 Eliz. c. 10 (*d*), enacted (*e*), that all leases thereafter to be made by any of the said ecclesiastical, spiritual, or collegiate persons, or others, of any of their said ecclesiastical, spiritual, or collegiate, lands, tenements, or hereditaments, whereof any former lease for years should be in being, not to be expired, surrendered, or ended, within three years next after the making of any such new lease, should be void, frustrate, and of no effect; and (*f*) that every bond and covenant thereafter to be made for renewing or making of any lease or leases contrary to the true intent of the act, or of 13 Eliz., should be utterly void. And in the 43rd year of the same reign (*g*), it was further enacted, that all judgments thereafter to be had, to the intent to have and enjoy any lease contrary to the said statutes, or any of them, should be deemed void in such sort as bonds and covenants were appointed to be void which were made for that purpose.

Even these various prohibitions were insufficient to accomplish in all respects the end desired; for it cannot be doubted that concurrent leases by archbishops and bishops were opposed to the spirit and design as well of the several restraining statutes as of 32 Hen. 8. c. 28. It will be remembered, that, as this act had no disabling operation, leases by archbishops and bishops, if duly confirmed, were unfettered until 1 Eliz. c. 19, was passed; and as that act did not preclude the grant of concurrent leases, the conse-

(*c*) O. Bridgm. by Bann. 101. 125.
135.

(*d*) Ante, p. 241.

(*e*) 18 Eliz. c. 11. s. 2.

(*f*) Sect. 3.

(*g*) 43 Eliz. c. 9. s. 3.

quence was, that, notwithstanding four or more years might remain unexpired of an existing lease, a new demise for years might be granted by an archbishop or bishop, so as to bind his successor, as a common law lease, provided it received the requisite confirmation, and was not inconsistent with the provisions of 1 Eliz. c. 19. The authority for this position (*h*) has not always been approved of, Vaughan, C. J., declaring (*i*), that the judges had made a great strain upon that statute; but as the case was determined, after mature deliberation, by a majority of ten judges, against the judgment of Dyer, Meade, and Plowden, the point seems no longer open to controversy. It has, however, lost some portion of its value in consequence of a late enactment (*k*), which has provided, that, where any lease shall have been granted by an archbishop or bishop of any house, land, tithes, or other hereditaments, parcel of the possessions of his sec, for twenty-one years, no such archbishop or bishop shall grant any new lease concurrently therewith, unless seven years of such lease shall have expired (*l*); the act at the same time declaring, that, where any lease shall have been granted for years, no archbishop or bishop shall grant any lease, by way of renewal of the same, or otherwise, for any life or lives (*m*); though previously thereto, a bishop could not, during the continuance of a lease for years, make a lease for lives to a stranger, to bind the successor, even if confirmed by the dean and chapter, the statute of 1 Eliz. c. 19, authorising, in the disjunctive, leases for twenty-one years or three lives, and not for years and for lives at the same time (*n*).

Concurrent leases of the houses and lands authorised by the statute of 14 Eliz. (*o*) to be demised for forty years

(*h*) Fox v. Collier, Mo. 107; S. C. 1 And. 65. 1 Leon. 36. 148. 3 Leon. 131. 3 Keb. 378. Ley, 78. And see O. Bridgm. by Bann. 101.

(*i*) Thredneedle v. Lincham, 3 Keb. 378.

(*k*) 6 W. 4. c. 20.

(*l*) Sect. 1.

(*m*) Sect. 1.

(*n*) Elmer's case, 5 Co. 2, a.; S. C., nom. Elmor v. Geale, Mo. 253. Marler v. Wright, Cro. Eliz. 141; S. C. 1 And. 193; Mo. 253. Roe dem. Brune v. Prideaux, 10 East, 184. 1 Leon. 148. Ley, 78.

(*o*) Chap. 11.

cannot be supported, as that act expressly prohibits (*p*) leases in reversion: and concurrent leases, though made to commence immediately, are regarded in law as leases in reversion (*q*); but whether a lease under this act commencing on a future day, and not exceeding the term of forty years from the making, can be supported is not clear. The cases are contradictory (*r*).

It is to be observed that the act of 18 Eliz. c. 11, which admits of concurrent leases where the former are within three years of being expired, surrendered, or ended, relates exclusively to 13 Eliz., leaving undisturbed the provisions of the statute of 14 Eliz. c. 11 (*s*).

Previously to the statute of 18 Eliz. c. 11, masters and fellows of colleges, deans and chapters of cathedral or collegiate churches, masters or guardians of hospitals, parsons and vicars, and others mentioned in the act of 13 Eliz., might make concurrent leases; and, as 6 W. 4. c. 20, does not affect their power, they are still capable of doing so, due regard being had to the provision in the statute of 18 Eliz. c. 11 (*t*), that the former lease for years be expired, surrendered, or ended, within three years next after the making of any such new lease. And the concurrent lease will be good, although more than three years of the old lease be outstanding, provided it be actually surrendered or otherwise determined within three years after the grant of the new one (*u*).

The statute of 32 Hen. 8. c. 28, is generally considered as the model or pattern for framing leases under the restraining statutes, the various essentials to the validity of leases

(*p*) Sect. 19.

(*q*) *Hunt v. Singleton*, Cro. Eliz. 473. 564; cited, 3 Co. 60, a. *Bayly v. Munday*, 2 Lev. 61; S. C., nom. *Bayly v. Murin*, 1 Vent. 244; S. C., nom. *Baily v. Munne, Mum, and Man*, 3 Keb. 46. 107. 193.

(*r*) *Thompson v. Trafford*, Poph. 8; S. C., nom. *Tompson v. Trafford*, 2

Leon. 188. Denied to be law, 1 Vent. 246; and per Holt, in *Winter v. Loveden*, 1 Ld. Raym. 269.

(*s*) *Crane v. Taylor*, Hob. 269. 3 Keb. 110.

(*t*) Sect. 2.

(*u*) *Wilson dem. Eyre v. Carter*, 2 Stra. 1201. *Grumbrell v. Roper*, 3 Barn. & Ald. 711.

required by that act being in most respects applicable to demises by virtue of the statutes of Elizabeth (*x*).

With regard to the term allowed to be granted, the distinction taken in Whitlock's case (*y*), between a particular power affirmative, and a general power restrained by a negative, has occasioned a difference in the construction of the enabling statute of 32 Hen. 8, and the restraining statutes of 1 Eliz. c. 19, and 13 Eliz. c. 10. The statute of Henry the 8th, as before noticed (*z*), by conferring a general power of leasing, with a subsequent clause of restraint, appears to warrant a lease for ninety-nine years determinable on lives; but it is otherwise with the acts of Elizabeth, which avoid all leases by the persons mentioned, other than for the term of twenty-one years or three lives. A lease, therefore, for ninety-nine years determinable on lives, being neither for twenty-one years, nor three lives, is nullified by the first part of the clause, without being saved by the exception in the latter part (*a*). Although the acts declare that leases other than for twenty-one years or three lives shall be void, a lease may be granted for any term within the extreme period, as for twenty years, or for two lives (*b*).

Leases rendering the lessee unimpeachable for waste are within the intent and equity of the statutes of 1 and 13 Eliz., notwithstanding their silence as to waste. The object of the statute was to guard against unreasonable leases; and it is clearly unreasonable that a tenant should at his pleasure commit waste and destruction (*c*).

Doubts having arisen whether archbishops or bishops, masters and fellows, or any other head and members of colleges, or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, or other persons having any spiritual or ecclesiastical promotions, had power to make leases of tithes or other incorporeal hereditaments only

(*x*) Co. Lit. 44, b. 45, a. Morrice
v. Antrobus, Hardr. 325.

(*y*) Whitlock's case, 8 Co. 69, b.
70, b.

(*z*) Ante, p. 75.

(*a*) Bac. Ab. Leases, (E) rule, 4.

(*b*) Carter v. Claycole, 1 Leon. 306.

(*c*) Co. Lit. 45, a. Dean and Chapter of Worcester's case, 6 Co. 37, a. Palm. 468.

which lay in grant, and not in livery, for one, two, or three, lives, or for any term or terms of years not exceeding twenty-one years, although the ancient rent should be reserved, and all other requisites prescribed by the acts then in being to that end observed, by reason of there being, generally, no place wherein a distress could be had for such rent; and also whether in cases of such leases for life or lives there was any remedy in law for such ecclesiastical or other persons by action of debt or otherwise for recovering the rent reserved on such leases for life or lives, an act was passed in the reign of George the 3rd (*d*) for obviating all doubts touching the same, and enabling the said archbishops and bishops and others above mentioned to make valid leases of such their incorporeal hereditaments, and to recover the rents reserved on any leases by them then already granted, or to be granted, for one, two, or three lives, and also to make good and effectual all such leases as had then already been granted by them, or any of them; and it was enacted, that all leases for one, two, or three, life or lives, or any term not exceeding twenty-one years, then already made, or which should thereafter be made, of any tithes, tolls, or other incorporeal hereditaments, solely, and without any lands or corporeal hereditaments, by any archbishop or bishop, &c., and every other person and persons who were enabled by the several statutes then in being, or any of them, to make any lease for one, two, or three, life or lives, or any term or number of years not exceeding twenty-one years, of any lands, tenements, or other corporeal hereditaments, should be as good against such archbishop and other persons granting the same, and their successors, as any lease then already made, or to be made, by any such archbishop and other persons having spiritual promotion, of any lands or other corporeal hereditaments then was by virtue of the statute of 32 Hen. 8. c. 28, or any other statute then in being.

The second section provided, that nothing in the act contained should extend to enable any master and fellows, or

(*d*) 5 Geo. 3. c. 17.

other head and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, or other ecclesiastical persons as therein aforesaid, to grant leases for any longer or other terms than by the local statutes of their several foundations they were respectively entitled to do.

And the 3rd section enacted, that, in case the rent reserved by any lease then already made, or to be made, by any archbishop, and every other person and persons so enabled to make leases for one, two, or three, life or lives, or years, in pursuance of the several acts of parliament then already in being, or by the act under consideration, or any part thereof, should be unpaid by the space of twenty-eight days after any of the days whereon the same should be reserved, it should be lawful for such archbishop, and other persons so making such leases, or their executors, administrators, and successors respectively, to bring an action of debt against the lessee, his heirs, executors, administrators, or assigns, for recovering the rent which should then be in arrear to any such archbishop and other person or persons before mentioned, his or their executors, administrators, or successors, in the same manner and as effectually as any lessor or other person or persons might do for recovering of arrears of rent due on any lease for life or lives or years by the laws then in being.

In a few years afterwards, it was enacted (*e*), that no rector or tithe-owner, in right of his rectory, vicarage, or curacy, or the lessee of either of them respectively, who should agree for or let his tithes of common field lands during the term of six years, or any part thereof, by virtue of the act under notice, (13 Geo. 3. c. 81,) should receive any fine, foregift, gratuity, or compensation whatever, other than by half-yearly or yearly payments (*f*).

The general inclosure act (*g*) enabled (*h*) the rector or

(*e*) 13 Geo. 3. c. 81, entitled "An Act for the better cultivation, improvement, and regulation of the common arable fields, washes, and commons of

pasture, in this kingdom."

(*f*) Sect. 23.

(*g*) 41 Geo. 3. c. 109.

(*h*) Sect. 33.

vicar for the time being of any parish wherein lands intended to be inclosed should be situate, by indenture under his hand and seal, with the consent and approbation of the bishop of the diocese, and of the patron of the rectory or vicarage, to lease the land allotted to such rector or vicar by virtue of the act, for any term not exceeding twenty-one years, to commence within twelve calendar months next after the executing the award; so that the rent for the same should be reserved to the rector or vicar for the time being, by four equal quarterly payments in every year; and so that there should be also reserved and made payable to such rector or vicar the best and most improved rent that could reasonably be had or gotten for the same, without taking any fine, foregift, premium, sum of money, or other consideration, for the making or granting any such lease; and so that no such lessee by any such lease should be made dispunishable for waste by any express words to be therein contained; and so that there should be inserted in every such lease power of re-entry on non-payment of the rent thereby reserved, within a reasonable time to be therein limited, after the same should become due; and so that a counterpart of such lease should be duly executed by the lessee. And the like provision is contained in the 31st section of the later act of 6 & 7 W. 4 (*i*).

Whenever any lease granted by any rector, vicar, or other incumbent, under the powers or provisions of the act above noticed (*k*), by any means becomes forfeited or void, or is surrendered, before the expiration by effluxion of time of the term thereby granted, the rector, vicar, or other incumbent, for the time being is empowered (*l*), with the previous consent of the ordinary and patron, to grant a new lease of the lands so demised, for such term of years as shall, at the time of such avoidance, be unexpired of the original term, subject never-

(*i*) 6 & 7 W. 4. c. 115, entitled "An Act for facilitating the inclosure of open and arable fields in England and Wales."

(*k*) 41 Geo. 3. c. 109.

(*l*) 1 & 2 Geo. 4. c. 23. s. 4. And see 6 W. 4. c. 20. s. 7.

theless to the provisions and conditions contained in such original lease, and then remaining unperformed and capable of having effect.

In the reign of William the 4th, it was found expedient, with a view to ulterior alterations, to impose certain restrictions on the renewal of leases by ecclesiastical persons, and it was provided (*m*), that, after the passing of the act, no archbishop, or bishop, ecclesiastical corporation sole or aggregate, dignitary, canon, or prebendary, or other spiritual person, nor any master or guardian of any hospital, should grant any new lease of any house, land, tithes, or other hereditaments, parcel of the possessions of his or their see, chapter, dignity, canonry, prebend, benefice, or hospital, by way of renewal of any lease which should have been previously granted of the same for two or more lives, until one or more of the persons for whose lives such lease should have been so made should die, and then only for the surviving lives or life and for such new life or lives as together with the life or lives of such survivor or survivors should make up the number of lives, not exceeding three in the whole, for which such lease should have been so made as thereinbefore mentioned; and that, where any such lease should have been granted for forty years, no such archbishop, bishop, &c., should grant any new lease by way of renewal of the same, until fourteen years of such lease should have expired; and that, where any such lease should have been made for thirty years, no such archbishop, bishop, &c., should grant any new lease by way of renewal of the same, until ten years of such lease should have expired; and where any such lease should have been granted for twenty-one years, no such archbishop, bishop, &c., should grant any new lease by way of renewal of the same, or (in the case of archbishops or bishops) concurrently therewith, until seven years of such lease should have expired; and that, where any such lease should have been granted for years, no such archbishop, bishop, &c., should grant any lease by way of

(*m*) 6 W. 4. c. 20. s. 1, which received the royal assent June 21, 1336.

renewal of the same, or otherwise, for any life or lives, any law, statute, or custom, to the contrary notwithstanding.

It was further enacted (*n*), that whenever any archbishop, bishop, &c., should thereafter grant any renewed lease, such lease should contain a recital or statement, in the case of a lease for lives, setting forth the names of the several persons named as *cestuis que vie* in the then last preceding lease of the same premises, and stating which of such persons, if any, should be then dead, or for whose life that of some other person had been exchanged by virtue of the proviso thereafter contained; and in case of a lease for years, setting forth for what term of years the then last preceding lease of the same premises was granted, and how much of such term had then expired, and how much remained to come and unexpired; and (*o*) that every such recital or statement should, so far as should relate to the validity of the lease so to be granted, be deemed and taken to be conclusive evidence of the truth of the matter so recited or stated.

The third section declared, that every person executing any such lease or any counterpart thereof, knowing such recital or statement to be false, or wilfully introducing, or aiding or assisting in introducing, any such recital or statement into any such lease, knowing the same to be false, or preparing or ingrossing any lease or counterpart of a lease containing any such false recital or statement, knowing the same to be false, should be deemed guilty of a misdemeanor, and should, in addition to any punishment to which he might be liable, forfeit to any person suing for the same the sum of 500*l.*, or, at the option of such person, five years' improved annual value of the hereditaments comprised in such lease.

It was provided, however (*p*), that where it should be certified, in manner thereafter mentioned, that for ten years preceding the passing of the act it had been the usual practice (such practice having in the case of a corporation sole commenced prior to the time of the person for the time

(*n*) Sect. 2.

(*o*) The word *and* is not in the act.

(*p*) Sect. 4.

being representing such corporation) to renew such leases for forty, thirty, or twenty-one years respectively, at shorter periods than fourteen, ten, or seven years respectively, nothing in the act contained should prevent any archbishop, bishop, &c., from granting a renewed lease conformably to such usual practice; provided that such usual practice should be made to appear to the satisfaction of the archbishop of the province, in the case of a lease granted by such archbishop, or by a bishop, and, in the case of a lease granted by any other corporation or person, to the satisfaction of such archbishop and also of the bishop having jurisdiction over such corporation or person, and should before the granting of such lease be certified in writing under the hand of the archbishop in the one case, and of the archbishop and bishop in the other case; the certificate so signed by an archbishop only to be afterwards deposited in the registry of such archbishop, and the certificate so signed by an archbishop and also by a bishop to be afterwards deposited in the registry of such bishop; which certificate it was declared should be conclusive evidence of the facts thereby certified.

It was also enacted (*g*), that nothing in the act contained should prevent any archbishop, bishop, &c., from exchanging any life or lives in being for which any lease should have been granted, and accordingly granting any renewed lease with a view to effectuate such exchange of a life or lives; provided that the same should be approved of (in the case of an archbishop) by his majesty in council, or (in the case of a bishop) by the archbishop of the province, or (in the case of any inferior corporation or person) by the archbishop of the province and bishop of the diocese, such approbation, when required to be given by his majesty in council, to be testified by the president of the council certifying on the renewed lease to be granted such approbation, and in all other cases to be testified by the person or persons whose approval was thereby required certifying on such renewed lease his or their approbation of the same.

It was also enacted (*r*), that nothing in the act contained should prevent any grants or renewals of leases which might have been authorised by acts of parliament specially relating to the particular estates demised by such leases.

And further (*s*), that nothing in the act contained should prevent a lease from being granted with a view to confirm any title or otherwise for the life or lives of the same person or persons, or for the lives or life of the survivors or survivor of them, or for the same term of years, and commencing at the same period, as the lease last granted for a life or lives, or a term of years respectively.

It was further enacted (*t*), that every lease contrary to the act granted since the first day of March, 1836, or which should be granted after the passing of the act, should be void to all intents and purposes whatsoever; provided that nothing in the act contained should be deemed to affect any lease granted or to be granted pursuant to any covenant or agreement entered into previously to the 1st day of March, 1836.

The restrictions, however, imposed by this act have lately been somewhat relaxed by an act (*u*) for enabling ecclesiastical corporations aggregate and sole (with some few exceptions) to grant leases for long terms of years for the purposes of building and improvement, the fifth section of which empowers the corporations therein mentioned, with the consent thereby required, to confirm any lease, grant, or general deed, purporting to have been granted or made under the authority of the act, in any case in which for some technical error, informality, or irregularity in exercising the powers of the act, such lease, grant, or deed, shall be voidable or questionable, or to accept an actual or virtual surrender of any lease or grant which shall have been made and executed, or which shall purport to have been made and executed, by virtue of the act; and so far as regards any mines, minerals, quarries, or beds, watercourses, ways,

(*r*) Sect. 6.

(*s*) Sect. 7.

(*t*) Sect. 9.

(*u*) 5 & 6 Vict. c. 103, the provisions of which are set out at length, post, p. 269.

or other easements, which may be comprised in any such surrendered lease or grant, with such consent as thereafter mentioned, to make any new lease or grant thereof in the same manner from time to time as if the powers of leasing therein contained had not been previously exercised; and so far as regards any lands and houses comprised in any such surrendered lease which may have been granted for building or repairing purposes, in any case where, at the time when such surrender shall be accepted, one fourth part or more than one fourth part of the term originally granted shall remain unexpired, with such consent as therein mentioned, to make a new lease, or several apportioned leases, of the lands and houses comprised in such surrendered lease, for any time not exceeding the then residue of the term granted, or mentioned or intended to be granted, by such surrendered lease; and so far as regards any lands and houses comprised in any such surrendered lease which may have been granted for building or repairing purposes, in any case where, at the time when such surrender shall be accepted, less than one fourth part of the term originally granted shall remain unexpired, with such consent as therein aforesaid, to make any new lease or grant thereof, in the same manner as far as may be applicable, as if the powers of leasing therein contained had not been exercised.

And the 16th section declares, that any lease or leases may be granted under the powers of the act, on the surrender of any existing lease or leases which shall not have been granted under the provisions of the act, of all or any part of the premises proposed to be comprised in such new lease or leases, and may be granted either to the person or persons surrendering the existing lease or leases, or to any other person or persons whomsoever; and each holder of any existing lease or leases granted otherwise than under the provisions of the act, of any lands or houses, or of any mines, minerals, quarries, or beds, which, if not in lease, would be capable of being leased under the powers of the act, is thereby authorised to surrender such lease or leases with a

view to the granting of a new lease or several new leases thereof, or of any part thereof, under the powers of the act, whether at the time of making such surrender the period at which such existing lease or leases may be legally or customably renewable shall or shall not have arrived.

Doubts having been entertained on the 2nd section of the act of 6 W. 4. c. 20, as to the validity of leases granted since the 1st of March, 1836, or to be thereafter granted by any archbishop, bishop, &c., and not containing such recital as was thereby required, it was shortly afterwards enacted (*v*), that no lease granted or to be thereafter granted by any archbishop, bishop, &c., should be deemed to be void under the provisions of the act of 6 W. 4, c. 20, by reason only of its not containing such recital or statement as therein mentioned; provided that whenever any archbishop, bishop, &c., should thereafter grant any such renewed lease, and such lease should contain such recital or statement as in the act is mentioned, every such recital or statement should, so far as should relate to the validity of the lease so to be granted, be deemed to be conclusive evidence of the truth of the matter so recited.

By a late act (*x*), it has been provided (*y*), that if, for the purpose of more fully carrying into effect the provisions of the act of 3 & 4 Vict. c. 113, relative to augmentations, it shall appear to the ecclesiastical commissioners for England and to any bishop or chapter to be expedient that any land belonging to such bishop or chapter adjacent to or situate within the distance of twenty miles from any city or town should be let or sold for purposes of building or other improvement, it shall be lawful for such bishop or chapter, as the case may be, with the consent of the said commissioners under their common seal, to grant any lease or leases of such land for such period or periods, and upon such conditions, as the said commissioners, having regard to the circumstances of the case, shall deem just and equitable, or, with the like consent,

(*v*) 6 & 7 W. 4. c. 64.

(*x*) 4 & 5 Vict. c. 39.

(*y*) Sect. 26.

to convey the said land in fee-simple for such price as shall appear to the said commissioners to be the full value thereof; provided that the rent in the former case, or the purchase-money in the latter case, after reserving to the bishop or chapter, as the case may be, an annual payment, equal to the amount theretofore enjoyed in respect of the land so let or sold, shall be wholly applied to the purposes of the said act, the consent of the said commissioners being in all cases necessary to the particular application thereof; provided also, that, if it be deemed expedient with a view to the better effecting of such purposes, such rent or purchase-money, or any part thereof, may, with the like consent, be at any time reinvested in the purchase of land.

Additional facilities have been conferred on the ecclesiastical body by two acts of parliament passed in the present reign, the former of which (*z*) enables incumbents of ecclesiastical benefices to demise the lands belonging to their benefices on farming leases; the latter (*a*) enables ecclesiastical corporations aggregate and sole, with some few exceptions, to grant leases for long terms of years for the purposes of building or improvement. But as the conditions connected with the exercise of the power are numerous and particular, it is necessary to state them in detail.

By the former of these acts, after reciting that it would be advantageous to ecclesiastical benefices if the incumbents thereof were empowered, with such consent and under such restrictions as thereafter expressed, to demise the lands of or belonging to the same for a term of years certain, for farming purposes, it was enacted (*b*), that it shall be lawful for the incumbent for the time being of any benefice, (the term "benefice" comprehending (*c*) every rectory, vicarage, perpetual curacy, donative, endowed public chapel, parochial chapelry, and district chapelry, the incumbent of which in right thereof shall be a corporation sole,) from time to time, by deed under his hand and seal, with the consent of the patron

(*z*) 5 Viet. sess. 2. c. 27.

(*a*) 5 & 6 Viet. c. 108.

(*b*) Sect. 1.

(*c*) Sect. 15.

of such benefice, and of the bishop of the diocese wherein the same is locally situated ; and, where the lands proposed to be leased are of copyhold or customary tenure, with the consent also of the lord for the time being of the manor of which the same are holden, in any case where the lease proposed to be granted cannot according to the custom of the manor be effectually made without the license of the lord ; such respective consents to be testified by the persons whose consents are by the act required respectively being parties to, and signing and sealing, such deeds before the execution thereof by such incumbent, to lease any part of the glebe lands or other lands of or belonging to such benefice, either with or without any farm-houses, cottages, barns, or other agricultural buildings or conveniences, parcel of or belonging to such benefice, to any person whomsoever (*d*), for any term of years not exceeding fourteen years, to take effect in possession, and not in reversion or by way of future interest ; so that there be reserved on every such lease, payable to the incumbent for the time being of such benefice, quarterly in every year during the continuance of the term thereby granted, the best and most improved yearly rent that can be reasonably gotten for the same, without taking any fine, foregift, premium, or other consideration, for granting such lease ; and so that no such lessee be made dispunishable for waste by any clause or words to be contained in such lease ; and so that the lessee do thereby covenant with the incumbent granting such lease, and his successors, for due payment of the rent thereby to be reserved, and of all taxes, charges, rates, assessments, and impositions whatsoever, payable in respect of the premises leased ; that he will not assign or underlet the hereditaments comprised in such lease, or any part thereof, for all or any part of the term thereby granted, without the consent of the bishop of the diocese for the time being, and the patron and incumbent for the time being of the said benefice, to be testified by their respectively being parties to, and sealing and

(*d*) The word "person" being construed to include the Queen's Majesty, and any corporation aggregate or sole, as well as a private individual ; Sect. 15.

delivering, the deed or instrument by which any assignment or underlease of the same premises, or any part thereof, may be effected; and that he will in all respects cultivate and manage the lands and hereditaments thereby leased according to the most improved system of husbandry in that part of the country where such lands and hereditaments are locally situated, so far as such system may not be inconsistent with any express stipulation to be contained in such lease; and that he will keep, and at the end of the term leave, all the lands comprised in such lease, together with the gates, drains, and fences of every description, and other fixtures and things thereupon or belonging thereto, in good and substantial repair and condition; and that he will at all times during the continuance of the term keep the buildings comprised in such lease, or to be erected during the term upon the lands thereby demised, or on any part thereof, insured against damage by fire, in the joint names of the lessee, his executors or administrators, and of the incumbent of the benefice for the time being, in three-fourths at the least of the value thereof; and that he will lay out the money to be received by virtue of any such insurance, and all such other sums of money as shall be necessary, in substantially rebuilding, repairing, and reinstating, under the direction of a surveyor to be for that purpose appointed by the incumbent of such benefice for the time being and such lessee, by some writing under their respective hands, such messuages or buildings as shall be destroyed or damaged by fire; and so that there be inserted in every such lease a reservation, for the use of such incumbent and his successors, of all timber trees and trees likely to become timber, and of all saplings and underwoods, and of all mines and minerals, except as is after in the act provided (e); and also a power of re-entry in case the rent thereby to be reserved shall be unpaid for the space of twenty-one days next after the same shall become due, or in case the lessee shall be convicted of felony, or shall

(e) Post, p. 260.

become a bankrupt, or shall take the benefit of any act or acts of parliament in force or after to be passed for the relief of insolvent debtors, or shall compound his debts, or assign over his estate and effects for payment thereof, or in case any execution shall issue against him or his effects, or in case such lessee shall not from time to time duly observe and perform all the covenants and agreements on his part in such lease to be contained; and so that the lessee in each such lease do execute the same or a counterpart thereof: Provided always, that any stipulation, covenant, condition, or agreement, in any such lease to be contained, on the part of the lessee, for the adoption and use of any particular mode or system of cultivation, or for the drainage, or subdividing, or embanking, or warping, (in those places where the system of improvement of land called "warping" is or may be practised,) of all or any of the lands comprised in such lease, or for the erection of any new or additional farm-houses, barns, or outhouses, or other farm-buildings, which the condition or local situation of the lands to be comprised in such lease may require or render expedient, or for putting in repair any houses, edifices, or buildings, to be comprised in any such lease, or for making any substantial improvements on the premises, or for the reservation or payment of any additional rent or rents, or penalty, on breach of any of the covenants or agreements contained in any such lease, shall not be deemed to be a fine, foregift, premium, or consideration for the granting of such leases within the meaning of the act: Provided also, that nothing therein contained shall be construed to preclude the lessor in any such lease from covenanting that the lessee shall be entitled to have or take from off the demised premises, brick earth, stone, lime, or other materials, for the erection or repair of any buildings, or for the construction or repair of drains, or for any other necessary improvements, and sufficient rough timber, to be assigned by the incumbent for the time being, or his agent duly authorised, for any of the purposes before mentioned, and for the making or repair of

gates and fences: Provided also, that the custom of the country as to outgoing tenants shall apply to each lease to be granted under the act, except so far as the lease shall contain any express stipulation to the contrary: Provided also, that the term to be granted by any such lease may be twenty years in any case where the lessee shall covenant thereby to adopt and use any mode or system of cultivation more expensive than the usual course, or to drain and subdivide, or embank and warp, at his expense, any part of the demised premises, or to erect, at his own expense, on the premises, any buildings, or to repair in a more extensive manner, and at a greater expense, than is usually required of lessees of farms, any buildings on the demised premises, or in any other manner to improve, at his expense, the demised premises or any part thereof.

The authority given by the act is not to render valid any lease, unless the parsonage-house, or other the house of residence belonging to the benefice, and all offices, outbuildings, yards, gardens, orchards, and plantations, to such parsonage-house, or other house of residence, adjoining and appurtenant, and which may be necessary or convenient for actual occupation with such parsonage-house, or other house of residence, and also so much glebe land or other land of or belonging to the benefice, and situated the most conveniently for actual occupation by the incumbent, as, together with the site of such parsonage-house, or other house of residence, offices, and outbuildings, and with such yards, gardens, orchards, and plantations, shall amount to ten acres at least, if there shall be ten or more acres of such land situated within five miles from the parsonage, or other the house of residence, or if there shall be less than ten acres so situated, then the whole of such land, shall be reserved out of, or not be comprised in, such lease, and not be comprised in any subsisting lease for the time being which shall have been previously granted under the authority of the act: but in any case where the lands comprised in any lease so granted shall be situate five miles or upwards from the parsonage-house, or other the

house of residence, or (in case there shall be no parsonage house or other house of residence) from the church or chapel of the benefice to which such lands shall belong, the provision for the reservation of a stipulated number of acres of the glebe land, or other land, of or belonging to the benefice is not to be applicable (*f*).

Whenever a lease is intended to be granted under the authority of this act, a competent land-surveyor is to be appointed by the bishop of the diocese, and the patron and incumbent of the benefice, by writing under their hands; and such surveyor is to make a map or plan under an actual survey of the lands proposed to be leased, and of the other lands belonging to the benefice, or of such part or parts of the said other lands as will sufficiently show to the bishop and patron the relative positions or local situations and quantities of the lands proposed to be leased, and of the lands (if any) intended to be reserved, and as will enable them to form an accurate judgment of the situation and convenience for actual occupation of the lands intended to be reserved; and the surveyor is to certify that the lands intended to be leased, and such buildings and other hereditaments (if any) intended to be leased therewith, are proper to be leased, and (in any case where the provision respecting the reservation of a stipulated number of acres may be applicable) that the lands intended to remain unlet are such part of the glebe land, or other land, belonging to the benefice, as is situated the most conveniently for actual occupation by the incumbent thereof; and the surveyor is also to make a valuation on actual survey of the lands and hereditaments proposed to be leased, and report what is the best yearly rent which ought to be reserved under the circumstances, and to state the course of husbandry or management which ought in his opinion to be adopted by the tenant; and in any case where it is proposed that the lease shall contain special covenants on the part of the lessee for the drainage, or subdividing, or embanking, or warping, of all or any of the lands to be comprised in the lease, or for the erection

of any new or additional farm-houses, barns, or outhouses, or other farm-buildings, or for putting in repair any houses, edifices, or buildings, to be comprised in the lease, or for making any substantial improvement in the premises, the surveyor is to certify that in his opinion the covenants for those purposes are proper covenants to be entered into by the lessee under the circumstances of the case; and he is to state the amount by which the yearly rent ought in his judgment to be diminished in respect of the lessee entering into such covenants; and in any case where it is proposed that the lessee shall be entitled to have from off the demised premises brick earth, stones, lime, or other materials, or rough timber, he is also to certify that in his opinion the covenants on the part of the lessor for those purposes are proper to be entered into, and that he has taken the matter into his consideration in estimating the amount of rent to be reserved; and such surveyor is in all cases also to report upon and state such other matters or things (if any) connected with such intended lease as he shall, by such bishop, patron, and incumbent, or any of them, be directed to report upon; and the map, or plan, certificate, valuation, and report of the surveyor, are to be signed by him, and verified by his declaration to be made before any justice of the peace, and immediately upon the completion thereof respectively are to be delivered to the bishop. In all cases, however, in which there shall be in the possession of the bishop, or of the patron or incumbent, or of the parish officers of the parish in which such benefice may be comprised, any map or plan made under an actual survey of the parish, or of such part thereof as shall include the lands proposed to be demised, a copy of, or an extract from, such map or plan may be substituted for the map or plan by the act directed to be made by any such surveyor (*g*).

The receipt in writing of the incumbent by whom the lease shall be granted, acknowledging the receipt of the counterpart, or an attested copy where there shall be only one part

of such lease, and signed by the incumbent, and indorsed on the lease, is to be conclusive evidence that the counterpart or lease (as the case may be) has been duly executed by the lessee, and also, where there shall be only one part of such lease, that the attested copy is a true and faithful transcript of the original lease; and the execution of the lease by the bishop and patron, whose consents are made requisite, is to be conclusive evidence that the lease does not comprise any lands which ought not to be leased, and that a proper portion of the glebe land remains unleased, and that the rent reserved is the best and most improved rent that could be reasonably gotten at the time of granting the lease, and that all the covenants contained in the lease are proper covenants (*h*).

No surrender of any lease which shall be made under the authority of the act is to be valid to any purpose whatsoever unless the bishop and the patron and incumbent respectively be made parties to and execute the deed or instrument by which such surrender shall be made; and every such surrender is to have operation from the time only when such deed or instrument shall have been executed by all the persons whose execution thereof is required (*i*).

All the powers, authorities, and duties, by the act given to, or imposed upon, the bishop of any diocese are, with respect to the several peculiars locally situated within such diocese, to be exercised and performed by the archbishop or bishop to whom such peculiars may respectively belong, and not by the bishop within whose diocese such peculiar shall be locally situated; but, with respect to all peculiars belonging to any other person than archbishops or bishops, such powers, authorities, and duties, are to be exercised and performed by the bishop of the diocese within which such peculiars shall be locally situate (*k*).

Whenever the consent of the patron of the benefice, or of the lord of the manor, is required, and the patron or the lord (as the case may be) shall be a minor, idiot, lunatic, or feme

covert, or beyond seas, the guardian, committee, husband, or attorney, (as the case may be,) of such patron or lord (but in the case of a feme covert, not being a minor, idiot, or lunatic, or beyond seas, with her consent in writing,) may execute the instrument by which such consent is to be testified, in testimony of the consent of such patron or lord; and such execution is, for the purposes of the act, to be deemed to be an execution by the patron or by the lord (as the case may be) (*l*).

Where the consent of the patron is required, and the patronage of the benefice shall be in the crown, the consent of the crown is to be thus testified:—if the benefice shall be above the yearly value of 20*l*. in the King's books, the instrument by which such consent shall be testified is to be executed by the lord high treasurer, or first lord commissioner of the treasury, for the time being; and if such benefice shall not exceed the yearly value of 20*l*. in the King's books, such instrument is to be executed by the lord chancellor, or lord keeper, or lords commissioners of the great seal, for the time being; and if such benefice shall be within the patronage of the crown in right of the duchy of Lancaster, such instrument is to be executed by the chancellor of the duchy for the time being; and the execution of such instrument by such person or persons is to be deemed, for the purposes of the act, to be an execution by the patron of the benefice (*m*).

Where the consent of the patron is required, and the right of patronage shall be part of the possessions of the duchy of Cornwall, the consent of the patron is to be thus testified:—the instrument by which such consent is to be testified shall, whenever there shall be a duke of Cornwall, whether he be of full age, or otherwise, be under his great or privy seal; or if there be no duke of Cornwall, and such benefice shall be in the patronage of the crown in right of the duchy of Cornwall, such instrument is to be executed by the person or persons authorised to testify the consent of the crown; and such instrument, being so sealed or executed, is to be deemed,

(*l*) Sect. 7.(*m*) Sect. 8.

for the purposes of the act, to be an execution by the patron of the benefice (*n*).

Where the consent of the patron, or of the lord of the manor, is required, and the patronage of the benefice, or (as the case may be) the lordship of the manor, shall belong to any dean and chapter, or collegiate or other corporate body having a common seal, the consent of such dean and chapter, or collegiate or other corporate body, is to be testified by the sealing of the instrument by which such consent is to be testified with the common seal of such dean and chapter, collegiate or other corporate body (*o*).

The person or persons (if not more than two), or the majority of the persons (if more than two), or the corporation, who or which would for the time being be entitled to the turn or right of presentation to any benefice if the same were then vacant, are to be considered to be the patron thereof: provided, that, in case of the patronage being exercised alternately by different patrons, the person or persons (if not more than two), or the majority of the persons (if more than two), or the corporation who or which would for the time being be entitled to the second turn or right of presentation to any benefice, if the same were then vacant, shall, for the purposes of the act, jointly with the person or persons or corporation entitled to the first turn or right of presentation, be considered to be the patron thereof (*p*).

Whenever any person shall sustain any more than one of the characters of bishop, patron, lord of the manor, and incumbent, in respect of any benefice to which the provisions of the act extend, every such person shall or may at any time act in both or all of the characters which he shall so sustain, and execute and do all such deeds and acts as are by the act authorised to be executed and done, as effectually as different persons, each sustaining one of those characters, could execute and do the same (*q*).

Whenever any lands or hereditaments proposed to be

leased under the provisions of the act shall be vested in trustees for the incumbent, so that the net income, or three-fourth parts at the least of the net income, of such lands and hereditaments shall be payable for the exclusive benefit of such incumbent, all the powers of the act which, in case such lands and hereditaments had been legally vested in such incumbent for his sole and exclusive benefit, might have been exercised by such incumbent in relation to the same lands and hereditaments, shall or may be exercised by the incumbent in the same or the like manner as the same might have been exercised by him in case the same lands and hereditaments were legally vested in him; but, in order to give legal effect to any lease, the trustees are to be made parties thereto, in addition to the other parties whose concurrence is declared to be requisite to any such lease, and are to join in the demise; and the trustees are by the act directed and required at all times to execute any lease to which they may be made parties, with a view to give legal effect to any such lease, as soon as the same may be tendered to them for execution, after the same shall have been duly executed by the incumbent beneficially entitled to such premises and the bishop and patron, whose consents are declared to be requisite; and the fact that any such lease is executed by the said other parties, is to be a sufficient authority for the execution thereof by the trustees; and it shall not at any time afterwards be necessary for such trustees, or for any other persons, to prove that such deed was executed by such other parties, or any of them, prior to the execution thereof by such trustees; provided that no trustee is to be compellable to execute any lease whereby he shall render himself in any way liable further than by a covenant for quiet enjoyment by any lessee against the acts of the trustee executing such deed (*r*).

The part of every lease granted under the act which shall belong to any incumbent, or, in case there shall not be more than one part of any such lease, an attested copy thereof, and every surrender to be made under the act, together with the

writing by which a surveyor shall have been appointed, and the map or plan, or copy of, or extract from, a map or plan, (as the case may be,) certificate, valuation, and report, directed to be made before the granting of such lease, are, within six calendar months next after the date of such lease, to be deposited in the office of one of the registrars of the diocese wherein such benefice shall be locally situated, to be kept and preserved therein, except where the benefice shall be under the peculiar jurisdiction of any archbishop or bishop, in which case the several documents before mentioned are to be deposited in the office of the registrar of the peculiar jurisdiction to which such benefice shall be subject; and such registrars respectively, or their respective deputies, are, upon any such deposit being so made, to sign and give unto the incumbent a certificate of such deposit; and such lease, or attested copy, and other documents so to be deposited, are to be produced, at all proper and usual hours, at such registry, to the incumbent of the benefice for the time being, or to the patron of such benefice for the time being, or to any person on their or either of their behalf, applying to inspect the same; and an office copy thereof, respectively certified under the hand of the registrar or his deputy, (and which office copy so certified the registrar or his deputy is in all cases, upon application in that behalf, to give to the incumbent for the time being,) is in any action against the lessee, and in all other cases, to be admitted and allowed in all courts whatsoever as legal evidence of the contents of such lease, or of any such other document, and of the due execution of the counterpart of such lease by the lessee, if there shall be any counterpart, and of the due execution of the lease, and of every such other document, by the parties who on the face of such office copy shall appear to have executed the same; and every such registrar is to be entitled to the sum of 5*s.*, and no more, for so depositing the documents directed to be deposited, and for certifying the deposit thereof, and the sum of 1*s.*, and no more, for each search and inspection, and the sum of 6*d.*, and no more, over and

besides the stamp duty (if any), for each folio of seventy-two words of each office copy so certified (s).

The latter of the acts above referred to (*l*), after noticing that it would be advantageous to the estates of ecclesiastical corporations, aggregate and sole, and for the interests of the church, if such corporations were empowered to grant leases for long terms of years under proper reservations and restrictions, enables (*u*) any ecclesiastical corporation, aggregate or sole, except any college or corporation of vicars choral, priest vicars, senior vicars, custos and vicars, or minor canons, and except also any ecclesiastical hospital or the master thereof, from time to time after the passing of the act, with such consent and under such restrictions as thereafter mentioned, by any deed duly executed, to lease all or any part of the lands or houses of or belonging to such corporation in his or their corporate capacity, (except as thereafter mentioned,) and whether such lands or houses may or may not have been previously leased under the provisions of the act, for any term or number of years not exceeding ninety-nine years, to take effect in possession, and not in reversion or by way of future interest, to any person who may be willing to improve or repair the present or any future houses thereon, or any of them, or to erect other houses instead thereof, or to erect any houses or other buildings on any lands whereon no building shall be standing, or who shall be willing to annex any part of the same lands to buildings erected or to be erected on the said lands, or any part thereof, or otherwise to improve the said premises, or any part thereof; and with or without liberty for the lessee to take down any buildings which may be upon the lands in such leases respectively to be comprised, and to dispose of the materials thereof to such uses and purposes as shall be agreed upon; and with or without liberty for the lessee to set out and allot any part of the respective premises to be comprised in any such lease, as and for ways, passages, sewers, drains, wells, reservoirs, yards, or otherwise, for the use and conve-

(s) Sect. 14.

(l) 5 & 6 Vict. c. 103.

(u) Sect. 1.

nience of the respective lessees, tenants, or occupiers of the premises, or for the general improvement of the premises; and also with or without liberty for the lessee to dig, take, and carry away, and dispose of, such earth, clay, sand, loam, or gravel, as it shall be found convenient to remove for effecting any of the purposes thereinbefore mentioned; so as there be reserved by every such lease the best yearly rent that can be reasonably obtained for the premises therein comprised, payable half-yearly, or oftener; and so as every such lease be made without taking any fine, premium, or foregift, or anything in the nature thereof, for or in respect of the making the same; and so as in every such lease made for the purpose of having buildings erected, there shall be contained a covenant on the part of the lessee to build, complete, and finish, the houses which may be agreed to be erected on the premises, if not then already done, within a time or times to be specified for that purpose, and to keep in repair during the term such houses; and so as in every such lease made for the purpose of having buildings repaired or rebuilt there shall be contained a covenant on the part of the lessee or lessees substantially to rebuild or repair the same within a time or times to be specified, and to keep in repair during the term the houses agreed to be rebuilt and repaired; and so as in every such lease, whether for the purpose of having buildings erected or otherwise, there be contained on the part of the lessee a covenant for the due payment of the rent to be thereby reserved, and of all taxes, charges, rates, assessments, and impositions whatsoever, affecting the same premises, and also a covenant for keeping the houses erected, and to be erected, on the premises to be therein comprised, (except any works or manufactories which may not be insurable,) insured from damage by fire, to the amount of four-fifths at least of the value thereof, in some or one of the public offices of insurance in London, Westminster, Norwich, Bristol, Exeter, Newcastle-on-Tyne, York, or Liverpool, or of the Kent Fire Insurance Company, (the particular office of insurance being named in the lease,) and to lay out the money to

be received by virtue of such insurance, and also all such other sums as shall be necessary, in rebuilding, repairing, and reinstating, such houses as shall be destroyed or damaged by fire, and also to surrender the possession of, and leave in repair, the houses erected and to be erected, or rebuilt, or repaired, on the premises therein comprised, on the expiration or other sooner determination of the term to be thereby granted, and, within twenty-one days after any assignment of such lease shall be made, to deliver a copy of such assignment to the lessor or reversioner for the time being; and so as in every such lease there be contained a power for the lessor or reversioner for the time being, and his or their surveyors and agents, to enter upon the premises, and inspect the condition thereof, and also a proviso or condition of re-entry for non-payment of the rent or rents to be thereby reserved, or for non-performance of any of the covenants, provisoes, and conditions, to be therein contained on the part of the lessee, his executors, administrators, or assigns, and with or without a proviso that no breach of any of the covenants, provisoes, and conditions, to be therein contained, (except the covenant for the payment of the rent, and other such covenants, provisoes, or conditions, if any, as may be agreed between the parties to be excepted,) shall occasion any forfeiture of such lease, or of the term thereby granted, or give any right of re-entry, unless or until judgment shall have been obtained in an action for such breach of covenant, nor unless the damages and costs to be recovered in such action shall have remained unpaid for the space of three calendar months after judgment shall have been obtained in such action; and that every such lease may also contain any other covenants, provisoes, conditions, agreements, and restrictions, which shall appear reasonable to the lessor for the time being, and the person or persons whose consent is by the act declared to be essential to the validity of such lease, and particularly any provision for apportioning the rent to be reserved by any lease made under the power given by the act, and for exonerating any part of the lands or

houses to be comprised in any such lease from the payment of any specified portion of the whole rent to be reserved; and so that the respective lessees execute counterparts of their respective leases.

On every building or repairing lease to be granted under the authority of this act, the corporation granting such lease may reserve a small rent during the six first years of the term, or during any of such six first years to be specified in the lease, and reserve, in addition thereto, an increased rent to become payable after the expiration of such six first years, or after any of such six years to be so specified, (as the case may be,) or otherwise to make any such increased rent first payable at any time not exceeding six years after the commencement of the term, when a stipulated progress shall have been made in the buildings, rebuildings, or reparations (*v*).

The corporations empowered by the act may, with such consent as is thereby declared to be requisite, lay out and appropriate any part of the lands which such corporation are empowered to lease on building or repairing leases under the provisions of the act, as and for ways, yards, or gardens, to the buildings erected, or to be erected, on any of the same lands, or on any of the adjoining lands so to be leased, or for yards or places necessary or convenient for carrying on any manufacture or trade, and also to appropriate any part of the same lands as and for ways, streets, squares, avenues, passages, sewers, or otherwise, for the general improvement of the estate, and the accommodation of the lessees, tenants, and occupiers thereof, in such manner as shall be agreed upon in any lease to be so granted, or in any general deed to be executed for that purpose, (such general deed, if any, to be duly executed by the corporation by the act authorised to make such deed, and to be made with such consent as therein mentioned, and to be enrolled in one of her Majesty's courts of record at Westminster within six calendar months from the

date of such deed,) and also by such lease or general deed to give such privileges and other easements as the corporation shall, with such consent, deem reasonable or convenient (*w*).

Any ecclesiastical corporation, aggregate or sole, except as therein mentioned, with the like consent, and under the like restrictions, may, by any deed duly executed, grant, by way of lease, any liberties, licenses, powers, or authorities, to have, use, or take, either in common with, or to the exclusion of, any other person or persons, all or any of the water flowing, and which shall or may flow, or be made to flow, in, through, upon, or over, any lands or hereditaments belonging to such corporation in his or their corporate capacity, or any part or parts thereof, (except as hereinafter mentioned,) (*x*); and also any wayleaves or waterleaves, canals, watercourses, tramroads, railways, and other ways, paths, or passages, either subterraneous or over the surface of any lands, store-yards, wharfs, or other like easements or privileges in, upon, out of, or over, any part or parts of the lands belonging to such corporation, in his or their corporate capacity, (except as hereinafter mentioned,) (*y*) for any term or number of years not exceeding sixty years, to take effect in possession, and not in reversion or by way of future interest, so as there be reserved on every such grant by way of lease, payable half-yearly or oftener during the continuance of the term of years thereby created, the best yearly rent or rents, either in the shape of a stated or fixed sum of money, or by way of toll, or otherwise, that can be reasonably had or gotten for the same, without taking any fine, premium, or foregift, or anything in the nature of a fine, premium, or foregift, for the making thereof, (other than any provision or provisions which it may be deemed expedient to insert in any such grant, rendering it obligatory on the grantee or lessee, or grantees or lessees, to repair, or contribute to the repair of, any roads or ways, or to keep open or otherwise use, in any specified manner, any water or watercourse to be comprised in or affected by any

(*w*) Sect. 3.

(*x*) Post, p. 277-8; Sect. 9.

such grant or lease); and so as there be contained in every such grant by way of lease a condition or power of re-entry, or a power to make void the same, in case the rent reserved, or any part thereof, shall not be paid within some reasonable time to be therein specified in that behalf; and so as the respective grantees or lessees do execute counterparts of the respective grants or leases; and, generally, that in and by each or any such grant by way of lease there be reserved and contained any other reservations, covenants, agreements, provisoes, or stipulations whatsoever, not inconsistent with those by the act required to be reserved or contained in each such grant by way of lease, which it shall be deemed expedient to introduce therein (*y*).

Any corporation by the act empowered to grant leases may, with the like consent, confirm any lease, grant, or general deed, purporting to have been granted or made under the authority of the act, in any case in which for some technical error, informality, or irregularity in exercising the powers of the act, such lease, grant, or deed, shall be voidable or questionable, or may accept an actual or virtual surrender of any lease or grant which shall have been made and executed, or which shall purport to have been made and executed, by virtue of the act; and so far as regards any mines, minerals, quarries, or beds, watercourses, ways, or other easements, which may be comprised in any such surrendered lease or grant, with such consent as therein aforesaid, may make any new lease or grant thereof in the same manner, from time to time, as if the powers of leasing therein contained had not been previously exercised; and so far as regards any lands and houses comprised in any such surrendered lease which may have been granted for building or repairing purposes, in any case where, at the time when such surrender shall be accepted, one fourth part or more than one fourth part of the term originally granted shall remain unexpired, with such consent as therein aforesaid, may make a new lease,

or several apportioned leases, of the lands and houses comprised in such surrendered lease, for any time not exceeding the then residue of the term granted, or mentioned or intended to be granted, by such surrendered lease, and at a rent or apportioned rents equal in amount to or exceeding the former rent or rents, yet so nevertheless that no one rent shall be less than 40s., and so that the rent to be reserved by any apportioned lease shall in no case exceed one fifth part of the rack-rent value of the land to be comprised in such lease, and of the houses erected or to be erected thereon when finished and fit for habitation; and so far as regards any lands and houses comprised in any such surrendered lease which may have been granted for building or repairing purposes, in any case where, at the time when such surrender shall be accepted, less than one fourth part of the term originally granted shall remain unexpired, with such consent as therein aforesaid, may make any new lease or grant thereof, in the same manner, as far as may be applicable, as if the powers of leasing therein contained had not been exercised; and so also that in the case of the confirmation of any lease, or of the making of any new lease or grant, whether the same shall be a lease of houses for building or repairing purposes, or a lease or grant of any mines, minerals, quarries, or beds, watercourses, ways, or other easements, no fine, premium, or foregift, shall be accepted for making or giving any such confirmation, or new lease, or grant, or apportioned lease respectively, and so as the lessee or grantee, his executors, administrators, or assigns, whose lease or grant shall be so confirmed, or to whom any such new or apportioned lease shall be granted in lieu of any former lease as therein aforesaid, do consent to accept such confirmation or new lease, or grant, or apportioned lease, and do execute a counterpart thereof (z).

The corporations empowered may also, with the like consent, grant or demise, by lease (a), for any term not exceeding sixty years, to take effect in possession, and not in reversion

(z) Sect. 5.

(a) So in act: Qy. "by way of lease"?

or by way of future interest, any mines, minerals, quarries, or beds, belonging to such corporation, together with the right of working, or of opening and working, the same, and of working any adjacent mine by way of outstroke or other underground communication, and together also with such portion of land belonging to such corporation, and all such rights and liberties of way and passage, and other rights, easements, and facilities, for the opening and working of all such mines, minerals, quarries, or beds, and leading and carrying the produce thereof, or otherwise incident to mining operations, as shall be deemed expedient; and every such lease is to contain such reservations by way of rent, royalty, or share of the produce in kind, all or any thereof, or otherwise, and such powers, provisoes, restrictions, and covenants, as shall be approved by the ecclesiastical commissioners for England, due regard being had to the custom of the country or district within which such mines, minerals, quarries, or beds, shall be situate; but no fine, premium, or foregift, nor anything in the nature thereof, is to be taken for or in respect of any such lease (*b*).

The execution of any lease, grant, or general deed, by the persons or corporations whose consent is by the act made requisite, is to be conclusive evidence that the several matters and things by the act required to be done have been duly done, and that the property comprised in such lease, grant, or general deed, (as the case may be,) does not form any part of the property excepted out of the powers of leasing conferred by the act, and that the rent reserved by such lease (except an apportioned lease or grant) is the best rent that could be reasonably obtained, and that no fine, or premium, or foregift, hath been taken, and (in the case of an apportioned lease) that the rent reserved by each such apportioned lease does not exceed one-fifth part of the rack-rent value of the land comprised in such lease, and of the houses erected or to be erected thereon, when fit for habitation (*c*).

Nothing in the act is to restrain any corporation thereby empowered from granting any leases, whether by way of renewal or otherwise, which such corporation might have lawfully granted, either under the provisions of any public or private act of parliament, or under any other authority, or in any other manner whatsoever, in case the act had not been passed, or from taking any fine, premium, or foregift, from the lessees in any renewed or new leases named or to be named, or from their underlessees, or from any other persons having or claiming an interest in any such renewal, for any such renewed or new leases, save and except that in every lease (other than any lease granted under the powers of the act) which shall be granted by such corporation of any lands or houses which shall have been leased for building or repairing purposes under any of the powers of the act, there shall be reserved the best improved rent, payable half-yearly or oftener, which can be obtained for the same, without taking any fine, premium, or foregift, or anything in the nature of a fine, premium, or foregift, for making or granting the same (*d*).

The act does not authorise the granting of a lease, or the laying out or appropriating, for the purposes in the act mentioned, of the palace or usual house of residence of or belonging to any archbishop, or bishop, or any other corporation sole thereby empowered, or of or belonging to any corporation aggregate thereby empowered, or of any offices, out-buildings, yards, gardens, orchards, or pleasure grounds, to any such palace or other house of residence adjoining or appurtenant, and which may be necessary or convenient for actual occupation with such palace or other house of residence, or the grant or lease of any mines, minerals, quarries, or beds, watercourses, ways, or other easements, the grant whereof may be prejudicial to the convenient enjoyment of any such palace or house of residence, or the pleasure grounds belonging thereto, or the leasing for the purposes therein

aforesaid of any lands which any such corporation, sole or aggregate, or any member of any such corporation aggregate, is expressly restrained from leasing by the provisions of any local or private act of parliament then in force (*e*).

Leases may be granted under the powers of the act, on the surrender of any existing lease or leases, (which shall not have been granted under its provisions,) of all or any part of the premises proposed to be comprised in any new lease, and may be granted either to the person or persons surrendering the existing lease or leases, or to any other person; and each holder of any existing lease, granted otherwise than under the provisions of the act, of any lands, or houses, or of any mines, minerals, quarries, or beds, which, if not in lease, would be capable of being leased under the powers of the act, may surrender such lease or leases, with a view to the granting of a new lease or several new leases thereof, or of any part thereof, under the powers of the act, whether, at the time of making such surrender, the period at which such existing lease or leases may be legally or accustomably renewable shall or shall not have arrived; and in the case of any lease granted under the powers of the act, on the surrender of any existing lease or leases, an adequate deduction is to be made from the rent, royalty, or other consideration, to be reserved on the new lease, in proportion to the value of the term or interest which shall be surrendered in the lands or houses, mines, minerals, quarries, or beds, or any part thereof respectively, comprised in such new lease (*f*).

Whenever a surrender shall be made of any existing lease for the purpose of taking a new lease, by virtue of the act, whether the existing lease shall or shall not have been granted under the provisions of the act, the new lease is to be deemed to be a renewal of the surrendered lease within the scope and meaning of the 6th section of the act of 1 Geo. 2. c. 28, intituled "An act for the more effectual preventing of frauds committed by tenants, and for the more easy recovery of

rents and renewal of leases," so far as to render unnecessary the surrender of any under-leases previously to the grant of such new lease, and to give full effect to such new lease in all respects, notwithstanding any under-lease or under-leases may not be surrendered: provided that, in any such case, if any subsisting unsurrendered under-lease shall contain any covenant or provision for the renewal or extension of the interest conferred by such under-lease, on payment by the under-lessee of a proportionate part of the fines and fees attending the renewal of the chief lease, the under-lessee shall not compel a renewal of the under-lease under such covenant, except upon the terms of securing to the under-lessee a rent, royalty, or other consideration, bearing the same proportion to the whole rent, royalty, or other consideration, reserved to the corporation exercising the powers of the act, upon the new lease, as the amount which upon any ordinary renewal ought to have been paid by such under-lessee of the fines and fees of or attending such renewal would have borne to the whole amount of the fines and fees attending such renewal (*g*).

Whenever any lease or apportioned leases, or grant by way of lease, is or are intended to be granted or made, or any land is proposed to be laid out or appropriated, under the authority of the act, a competent surveyor is to be appointed in writing by the ecclesiastical commissioners for England, with the consent of the corporation, and such surveyor is to make any such report, map, plan, statement, valuation, or certificate, as shall be deemed necessary, and be required by the commissioners or by such corporation (*h*).

Each lease or grant to be made under the provisions of the act is to be made with the consent of the ecclesiastical commissioners for England, and also with such further consent as thereafter mentioned; (that is to say,) each lease or grant made by any incumbent of a benefice (*i*), with the consent of

(*g*) Sect. 17.

(*h*) Sect. 18.

(*i*) The term "benefice" signifying

every rectory with or without cure of souls, vicarage, perpetual curacy, donative, endowed public chapel, paro-

the patron thereof; and each lease or grant by any corporation, either aggregate or sole, under the provisions of the act, of any lands, or houses, mines, minerals, quarries, or beds, of copyhold or customary tenure, or of any watercourses, ways, or easements, in, upon, over, or under, any such lands, where the copyhold or customary tenant thereof is not authorised to grant or make leases or grants for the term of years intended to be created by such lease or grant without the license of the lord of the manor, is to be made with the consent of the lord for the time being of the manor of which the same lands or houses, mines, minerals, quarries, or beds, shall be holden, in addition to the other requisite consents, and such consent shall amount to a valid license to lease or grant the same lands or houses, mines, minerals, quarries, or beds, watercourses, ways, or easements, (as the case may be,) for the time for which the same shall be expressed to be demised or granted by such lease or grant (*k*).

The consent of each person whose consent is required is to be testified by such person being made a party to such deed, and duly executing the same (*l*).

Sections 22, 23, 24, and 25, show how the consent of the patron is to be testified where the patronage is in the crown; where it is attached to the duchy of Cornwall; where the patron or lord of the manor is an incapacitated person; and where the patronage is in several persons or a corporation; the requisites corresponding with those contained in the act of 5 Vict. sess. 2. c. 27 (*m*).

Section 26 provides, that the same party may consent in more than one character, as in the act of 5 Vict. sess. 2. c. 27 (*n*).

Wherever the consent of any corporation aggregate having a common seal may be requisite, the consent of such corporation is to be testified by the sealing of the lease, grant, appoint-

chial chapelry, and district chapelry, the incumbent or holder of which in right thereof shall be a corporation sole.

(*k*) Sect. 20.

(*l*) Sect. 21.

(*m*) Ante, p. 264, *et seq.*

(*n*) Ante, p. 266.

ment, or other deed, writing or instrument, with the common seal of such corporation (*o*).

Section 28 provides, that the act shall extend to lands held in trust for corporations, similar to the 13th section of the act of 5 Vict. sess. 2. c. 27 (*p*).

The part which shall belong to any corporation exercising any of the powers conferred by the act of any lease, grant, or confirmation, which shall be granted or made under the authority of the act, and every map, plan, statement, certificate, valuation, and report, relating thereto, is, within six calendar months next after the date of such lease, grant, apportioned lease, confirmation, or general deed, (as the case may be,) to be deposited with the ecclesiastical commissioners for England, and to be for ever thereafter perpetually kept and preserved in the office of the said commissioners, who, upon any such deposit being so made, are to give to the corporation by or on behalf of whom such deposit shall have been made, a certificate of such deposit; and any instruments or documents which may have been deposited are to be produced at all proper and usual hours, at such office, to the corporation to whose lands or estate the same shall relate, or to the patron of the benefice, or to any person or persons applying to inspect the same on behalf of any such person or corporation; and an office copy of any such instrument or document, certified under the seal of the said commissioners, (which office copy so certified the said commissioners are required in all cases, upon application in that behalf, to give to any corporation or person to whom such liberty of inspection is given,) is, in any action against the lessee, and in all other cases, to be admitted and allowed in all courts whatsoever as legal evidence of the contents of such instrument or document, and of the due execution thereof by the parties who on the face of such office copy shall appear to have executed the same; and, in the case of any lease, grant, or confirmation, of the due execution by the lessee of the counterpart thereof (*q*).

(*o*) Sect. 27.

(*p*) Ante, p. 266-7.

(*q*) Sect 29.

If, in the case of any lease, grant, or confirmation, granted or made under the act, any fine, premium, or foregift, or anything in the nature thereof, shall directly or indirectly have been paid or given by or on behalf of the lessee or grantee, and taken or received by the lessor or grantor, such lease, grant, or confirmation, is to be absolutely void (*r*).

We may repeat in this place, that, in leases made by ecclesiastical corporations under the powers contained in the land-tax redemption act (*s*), the annual amount of the land-tax redeemed must be reserved, as well as the ancient and accustomed yearly rent.

The statutes already referred to in this chapter relate to leases by spiritual and eleemosynary corporations in general: two or three remain to be noticed which apply exclusively to certain particular corporations.

The act of 18 Eliz. c. 6, which is a private act, and must be specially pleaded (*t*), relates exclusively to leases of lands belonging to the universities of Cambridge and Oxford, and the colleges of Winchester and Eton; and prohibits leases of their lands, &c., to the which any tithes, arable land, meadow, or pasture, doth or shall appertain, except that the one-third part at the least of the old rent be reserved and paid in corn, to be calculated as therein is mentioned; and declares that all leases otherwise thereafter to be made, and all collateral bonds or assurance to the contrary, by any of the said corporations shall be void.

The second section provides, that the act or anything therein contained shall not extend or be in anywise prejudicial to any lease to be made of a barn called Mouncken Barn, with a certain portion of tithes rising, growing, and being, in the parish of Southweck, in the county of Sussex, being parcel of the possessions of Maudlin college, in Oxford, so that the term demised in and by the said lease exceed not the number of ten years from and after the feast of St. Michael the Archangel next coming.

(*r*) Sect. 30.

(*s*) 12 Geo. 3. c. 116. s. 69. Doe dem.
Murray v. Lord Bishop of Rochester,

1 Barn. & Adol. 347. And see ante,
p. 84.

(*t*) See 1 Leon. 306. Sav. 129.

And the third section provides, that the act shall not extend to any lease to be made by the president and scholars of the college of St. John Baptist in Oxford, to any heir male of Sir Thos. White, late knight, and alderman of London, founder of the said college, which lease shall be made according to the meaning of the foundation and statutes of the said college of the manor of Fifield, and no other hereditaments.

According to Blackstone (*u*), this plan of reserving a corn rent is said to have been an invention of Lord Treasurer Burleigh, and Sir Thomas Smith, then principal secretary of state, who, observing how greatly the value of money had sunk, and the price of all provisions risen, by the quantity of bullion imported from the new-found Indies, (which effects were likely to increase to a greater degree,) devised this method for upholding the revenues of colleges: and he adds, that their foresight and penetration have in this respect been very apparent, for though the rent so reserved in corn was at first but one-third of the whole rent, or half what was still reserved in money, yet now the proportion is nearly inverted, and the money arising from corn rents is, *communibus annis*, almost double to the rents reserved in money.

Leases of lands belonging to hospitals, or abiding and working houses for the poor, are restrained by the statute of 39 Eliz. c. 5, which enacted (*x*), that all leases, grants, conveyances, or estates, to be made by any corporation, to be founded as in the act is mentioned, exceeding the number of one-and-twenty years, and that in possession, and whereon the accustomed yearly rent or more by the greater part of twenty years next before the making of such lease shall not be reserved and yearly payable, should be void.

By a statute (*y*) passed a few years after the destructive fire of London, the dean and chapter of the cathedral church of St. Paul were empowered to make leases of certain ground set out for a market-place within Newgate, to the mayor,

(*u*) 2 Bla. Com. 322.

(*x*) 39 Eliz. c. 5, s. 5, made perpetual by 21 Jac. 1. c. 1. See The At-

torney-General *v.* The Corporation of Newcastle, 5 Beav. 307.

(*y*) 22 Car. 2. c. 11. s. 61.

commonalty, and citizens of London, and also of the wall of the said churchyard, abutting severally upon Paternoster-row and Old Change, for the term of forty years, reserving the yearly rents of 4*l.* for the ground of the market-place, and twopence for every superficial foot of the ground or soil of the wall, and so from forty years to forty years for ever, at the like yearly rent, and one year's rent to be paid by way of fine upon the making every new lease thereof; which said lease and leases were declared to be good and effectual against the said dean and chapter, and their successors, and all persons claiming by, from, and under them.

And the same statute, after noticing that parsons and vicars, (whose parsonage and vicarage houses had been destroyed by the great fire of London,) or some of them, were interested in several glebe lands or grounds, which they could not rebuild themselves, nor let such lease or leases as might be an encouragement to others to rebuild, empowered them (*z*) to let such lease or leases of their said glebe lands or grounds, with the consent and approbation of the patron or patrons and ordinary, for any term not exceeding forty years, and at such yearly rents, without fine, as could be obtained for the same.

The principal results of these various enactments, and their peculiar bearing on the several corporations respectively within their operation, may be thus stated:—

All ecclesiastical corporations aggregate or sole (except any college or corporation of vicars choral, priest vicars, senior vicars, custos and vicars, or minor canons, and except also any ecclesiastical hospital, or the master thereof,) on obtaining the consent required, and observing the restrictions imposed, by the act of 5 & 6 Vict. c. 108, may grant leases of their corporate lands or houses (*a*), except their house of residence, garden, &c. (*b*), for any term not exceeding ninety-nine years in possession, for the purposes of building or improvement, at the best yearly rent that can be obtained, with power to take a

(*z*) Sect. 75.

(*a*) 5 & 6 Vict. c. 108, s. 1. Ante, p. 269.

(*b*) Sect. 9. Ante, p. 277.

small rent for the first six years, and afterwards to reserve an increased rent (*c*); and, with such consent, and under the like restrictions, they may grant, by way of lease, rights to flowing water, wayleaves, waterleaves, &c. (*d*), and mines (*e*), except such as may be prejudicial to the enjoyment of the house of residence of the corporation (*f*), for any term not exceeding sixty years.

The incumbent of every benefice, (meaning, of every rectory, vicarage, perpetual curacy, donative, endowed public chapel, parochial chapelry, and district chapelry, the incumbent of which in right thereof shall be a corporation sole,) on obtaining the consent required, and under the restrictions imposed, by the act of 5 Vict. sess. 2, c. 27, may lease, for farming purposes, the glebe or other lands belonging to the benefice, with certain exceptions (*g*), for any term not exceeding fourteen years (*h*), or, in some particular cases, twenty years (*i*), in possession, at the best yearly rent.

Archbishops and bishops and other ecclesiastical corporations sole (parsons and vicars excepted) may also, by pursuing the requisites of the statute of 32 Hen. 8 (*k*), but subject to the restrictions of 6 W. 4. c. 20. s. 1., and 5 & 6 Vict. c. 108. s. 8, (*l*), lease the lands of which they are seised in fee in right of their churches, for three lives, or twenty-one years, at the accustomed rent or more, without the confirmation or concurrence of any other person.

Unless the provisions of that act, or, as the case may require, of the act of 5 Vict. sess. 2. c. 27, or 5 & 6 Vict. c. 108, be complied with, the concurrence or confirmation required by the common law must still be obtained.

Archbishops and bishops, masters of hospitals, and others mentioned in the act of 5 Geo. 3. c. 17, may lease their tithes and other incorporeal hereditaments for one, two, or

(*c*) Sect. 2. Ante, p. 272.

(*d*) Sect. 4. Ante, p. 273.

(*e*) Sect. 6. Ante, p. 275-6.

(*f*) Sect. 9. Ante, p. 277.

(*g*) 5 Vict. sess. 2. c. 27. s. 2. Ante, p. 261.

(*h*) Sect. 1. Ante, p. 257.

(*i*) Sect. 1. Ante, p. 261.

(*k*) 32 Hen. 8. c. 28. Ante, pp. 66, & 239.

(*l*) See post, p. 287.

three lives, or for any term of years not exceeding twenty-one (*m*).

Rectors and vicars, with the consent of the bishop and patron, may lease lands allotted to them under inclosures for any term not exceeding twenty-one years, under 41 Geo. 3. c. 109, and 6 & 7 W. 4, c. 115 (*n*).

But all ecclesiastical corporations (*o*), parsons and vicars included, and eleemosynary corporations, are precluded by the restraining statutes (*p*) from leasing their church estates for any longer period than three lives or twenty-one years (*q*) ; unless the lease be of ground mentioned in the act of 22 Car. 2. c. 11 ; or be of houses situate in any city, borough, town corporate, or market town, and grounds not exceeding ten acres appertaining thereto, which may be leased for forty years, the terms of the statutes of 22 Car. 2. c. 11, and 14 Eliz. c. 11, respectively, being observed ; or unless the lease be granted by virtue of the powers conferred by 5 & 6 Vict. c. 108. The privilege, however, of leasing, under 14 Eliz. c. 11, houses in any city, borough, &c., does not extend to archbishops and bishops, as that act refers only to the powers mentioned in 13 Eliz. c. 10, which did not affect those dignitaries.

Leases of lands belonging to hospitals, or abiding or working houses for the poor, for any term exceeding twenty-one years were prohibited by 39 Eliz. c. 5 (*r*).

As the restrictive statutes confer no new powers, and as parsons and vicars are expressly excluded from the operation of the enabling statute of Henry the 8th, all leases by them of their ecclesiastical possessions must still be confirmed by the patron and ordinary (*s*), unless they be made under the powers of the act of 5 & 6 Vict. c. 108, which requires the consent of the patron and the ecclesiastical commissioners for England,

(*m*) Ante, p. 247.

(*n*) Ante, p. 249-250.

(*o*) This does not extend to the ecclesiastical commissioners for England incorporated by 6 & 7 W. 4, c. 77.

(*p*) 1 Eliz. c. 19, and 13 Eliz. c. 10

Ante, p. 241.

(*q*) Bishop of Hereford *v.* Scory, Cro. Eliz. 374.

(*r*) Ante, p. 233.

(*s*) Co. Lit. 44, b.

and, in some cases, where copyholds are leased, of the lord of the manor also (*t*).

Where any lease shall have been granted for years, no archbishop, bishop, ecclesiastical corporation sole or aggregate, dignitary, canon, prebendary, spiritual person, master or guardian, shall grant any lease by way of renewal, or otherwise, for any life or lives (*u*).

And renewals are prohibited otherwise than in accordance with 6 W. 4. c. 20 (*x*).

A lease of lands belonging to an ecclesiastical corporation, being already in mortmain, need not pursue the requisites of 9 Geo. 2. c. 36 (*y*), though granted upon charitable trusts (*z*).

Though the disabling acts expressly declare that leases contravening their provisions shall be absolutely void, it is clear that they are good during the life of the person by whom they are made, in the case of a corporation sole (*a*) : and of the existence of the dean or other head of the corporation, in the case of a corporation aggregate (*b*). Of this latter position no doubt seems now to be entertained, notwithstanding Hale's authority to the contrary (*c*).

And it is said to have been decided (*d*), that acceptance of rent by a bishop's successor will prevent him, for his time, from avoiding the lease, which was voidable, although the rent be received through the hands of his bailiff, among other rents due to the bishop, and without notice that the rent in question was paid by his predecessor's lessee.

A sole corporation, as a bishop, or parson, cannot, in his

(*t*) Ante, p. 279-280.

(*u*) 6 W. 4. c. 20. s. 1; and s. 8 of 5 & 6 Vict. c. 108. Ante, pp. 251 & 277.

(*x*) Ante, p. 251.

(*y*) 9 Geo. 2. c. 36, an act to restrain the disposition of lands, whereby the same become unalienable.

(*z*) Walker v. Richardson, 2 Mees. & Wel. 332.

(*a*) Sale v. The Bishop of Coventry, 1 And. 241-4. Rickman v. Garth, Cro. Jac. 173. Morrice v. Antrobus, Hardr. 326. The Bishop of Salisbury's case,

10 Co. 58, b. 60, b. Doe dem. Bryan v. Banks, 4 Barn. & Ald. 407. Dakin v. Cope, 2 Russ. 175.

(*b*) Co. Lit. 45, a. Roe dem. Earl of Berkeley v. The Archbishop of Canterbury, 6 East, 102-3. Bac. Ab. Leases, (II). And see the Chapter of Southwell v. The Bishop of Lincoln, 1 Mod. 204.

(*c*) Hale's note (4) to Co. Lit. 45, a. Morrice v. Antrobus, Hardr. 325-6.

(*d*) Wheeler v. Danby, cited Cro. Car. 95.

corporate character, make a lease to himself, in his individual character (*e*). And the law is the same in the case of a corporation aggregate, as dean and chapter; for a lease cannot be made by the chapter without the concurrence of the dean; nor to (*f*) the dean without the concurrence of the chapter; but it may be made to any of the prebendaries, because it is not necessary that any of them should join in the lease; for a prebendary is not an integral part of the body corporate (*g*).

It is important to observe, that, in order to render a lease binding on the successor, the bishop, parson, or other ecclesiastical corporation, must have been previously consecrated, or inducted, and invested with the temporalities attached to the dignity or benefice (*h*); and, therefore, if one be appointed a bishop, but not ordained or consecrated, as, it is said, was sometimes the case in the reign of Edward the 6th, he cannot grant such a lease, even with confirmation, as will conclude the successor (*i*).

So, if A. be a bishop, and B., by a superinstitution, be created bishop of the same see during the life of A., a lease made by B. will not bind the successor, though confirmed by the dean and chapter. This was the bishop of Ossory's case (*k*). In the reign of Edward the 6th, John Bale was consecrated bishop of Ossory, but, having been a zealous opponent of popery, he was compelled in the succeeding reign of Queen Mary to secure his personal safety by taking refuge in Germany. In Bale's lifetime, and without his being formally deprived, the Queen procured the consecration of one Tonery, who, with the confirmation of the dean and chapter, granted a lease to the defendant (*l*). During the reign of Queen Elizabeth, Bale returned to Ireland, and died;

(*e*) *Salter v. Grosvenor*, 8 Mod. 303. Cro. Jac. 234. 14 H. 8. 2. pl. 2. [B].

(*f*) So in the report; *quere* "by"?

(*g*) *Ibid.* 13 H. 8. pl. 2. p. 13 [B].

(*h*) *Bac. Ab. Leases*, (F). p. 367. *Hare v. Bickley*, Plowd. 523. *The King v. Bishop of London*, Carth. 314. 1 Bla. Com. 330.

(*i*) *Bac. Ab. Leases*, (F). p. 367. *Bro. Ab. Leases*, pl. 68.

(*k*) *Bishop of Ossory's case*, Palm. 22; S. C., nom. *Reuan O'Brian v. Knivan*, Cro. Jac. 552; S. C., nom. *Sobrecan v. Kevan*, 2 Rol. 101. 130. See also *Harris v. Jays*, Cro. Eliz. 699.

(*l*) It appears by the reports of

and, on Tonery's death, which happened shortly afterwards, the succeeding bishop, Jonas Wheeler, commenced proceedings in the King's Bench in Ireland to set aside the lease so made by Tonery, and obtained judgment in his favor by the opinion of the two puisné justices, against the opinion of the chief justice. The cause was then brought by writ of error before the court of King's Bench in England, where the judgment was affirmed, and it was decided, that, as Tonery was not lawful bishop, the lease to charge the possessions of the bishopric was void; but that all judicial acts done by him, as admissions, institutions, certificates, and the like, were good; but not such voluntary acts as tended to the impoverishment of the successor. Nor can a bishop entitled to the advowson of a church full of an incumbent grant a lease to commence on the death or resignation of such incumbent. Thus, King Edward the 6th, being patron of a church full of an incumbent, by his letters patent granted the advowson to the bishop of Lichfield and Coventry and his successors; and, further, by the said letters patent granted, that, after the avoidance of the church by death, resignation, or otherwise, the said bishop and his successors should hold the said church to their proper use. The bishop afterwards made a lease by indenture for sixty years, to commence at such time as the said parsonage should come to the hands of the said bishop or his successors by the death, resignation, or otherwise, of the incumbent, which lease was confirmed by the dean and chapter. The bishop died; the incumbent died; the successor of the bishop entered, and made a lease for twenty-one years to Montgomery; and it was resolved, that the first lease was void, because the lessor had nothing in the parsonage impropriate during the life of the incumbent, who survived the lessor (*m*); and that it could not take effect by estoppel, because it appeared in the indenture itself

Palmer and Rolle, that the lease was not granted by Tonery till after Bale's death; but the ground of the judgment renders the difference unimportant.
 (*m*) Montgomery's case, 2 Dy. 244, a.
 10 Co. 43, a.

that the lessor had nothing at the time of the lease made (*n*). And a similar case (*o*) was afterwards ruled accordingly by Dyer, Justice, and Welshe, Justice.

But if one be lawful bishop at the time of making the lease, no subsequent deprivation will avoid it (*p*).

To qualify a parson to bind his successor by lease, it is sufficient if he be a parson *de facto* at the time of the lease. Thus, where a layman was presented to a benefice, instituted, and inducted, and leased the same with the confirmation of the patron and ordinary, and was then deprived on the ground of his being a lay person, still the lease was considered unimpeachable, having been made by the parson *de facto*, and duly confirmed (*q*). So, when the clergy were prohibited from marrying, if a parson made a lease with the requisite confirmation, and was afterwards deprived for having contracted matrimony, the lease could not be disturbed, as he was lawful parson at the period of confirmation (*r*).

Though the incumbent be even an infant (*s*), his leases, if duly confirmed, will bind his successor; for, having been regularly admitted to exercise the ecclesiastical function, he is supposed to be as competent to perform all things in his corporate capacity as a person of full age (*t*).

And it seems that an incumbent's power of leasing, as incumbent, is not destroyed by his election merely to a bishopric; for the vacancy of his benefice accrues on his consecration, and not before (*u*).

The lessees of incumbents guilty of simoniacal dealings are protected by an act of parliament (*x*), which provided (*y*), that

(*n*) 1 Co. 155, a.

(*o*) Jobson *v.* Michael, cited, 2 Dy. 244, b.

(*p*) Bac. Ab. Leases, (F.) p. 367. Bro. Ab. Leases, pl. 68.

(*q*) Costard *v.* Winder, or Wingate, Cro. Eliz. 775; S. C. Mo. 606. Dr. Harscot's case, Comb. 202. 1 Rol. Ab. Confirmation, (F.) pl. 1. See Bedinfield *v.* Archbishop of Canterbury and Pickering, 3 Dy. 292, b.; S. C. Benl.

195, pl. 234.

(*r*) 1 Rol. Ab. Confirmation, (F.) pl. 2. 2 Dy. 133, a.

(*s*) See leases by infants, ante, p. 33. note, (*m*).

(*t*) Bro. Ab. Age, pl. 64. 30. Bac. Ab. Leases, (F.).

(*u*) The King *v.* The Bishop of London, Carth. 314. 41 E. 3. 5, b.

(*x*) 1 W. & M. st. 1. c. 16.

(*y*) Sect. 3.

no lease or leases really and bonâ fide made, or thereafter to be made, by any such person simoniac, or simoniacally promoted to any deanery, prebend, or parsonage, or other ecclesiastical benefice or dignity, for good and valuable consideration, to any tenant or person not being privy unto, or having notice of, any such simony, shall be impeached or avoided for or by reason of such simony, but shall be good and effectual in law, the said simony notwithstanding.

If the church be already full of an incumbent, and another be collated to the benefice by the ordinary, the lease of the collatee cannot be supported, though confirmed by the patron and ordinary, for he was not parson when he granted the lease (*z*).

So, if the church be void, and one wrongfully enter, and without presentation or institution occupy the benefice as parson, his lease is void, though duly confirmed by the patron and ordinary (*a*). So, a lease by a parson in the interval between presentation and induction will not bind the successor, because till induction the lessor can have nothing in the temporal possessions (*b*).

According to Rolle (*c*), who cites 9 H. 6. 33, if the incumbent of a usurper make a lease, with the confirmation of the usurper and ordinary, and afterwards the true patron recover in a *quare impedit*, and remove the incumbent, the lease is defeated; for, in this case, he says, there was neither a rightful parson nor patron; but, according to C. B. Gilbert (*d*), who also relies on 9 H. 6. 33, it seems that the lease shall stand; because there was a patron *de facto*, who made and confirmed the lease, and the parson coming in by all the solemnities of law, when the church was void, the people could take notice of no other; and, therefore, all acts done by him and legally confirmed are good: but the learned baron,

(*z*) 1 Rol. Ab. Confirmation, (F) pl. 3.

(*a*) 1 Rol. Ab. Confirmation, (F) pl. 4.

(*b*) Ibid. Bac. Ab. Leases (G.) 3. p. 387. Anon. 2 Dy. 221, b. pl. (18).

2 Bla. Com. 312. Evans *v.* Askwith, Aseuthe, or Aseough, W. Jo. 153; S. C. Palm, 457; Latch, 233. Hare *v.* Bickley, Plowd. 528, a.

(*c*) 1 Rol. Ab. 430 (N.) pl. 4.

(*d*) Bac. Ab. Leases, (G.) 3. p. 387.

after noticing that Rolle cites the same case for a different position, concludes with, *ideo quære*.

But they both agree, that if a church be void, and one enter and occupy of his own wrong as parson, without presentation or institution, and make a lease, which is confirmed by the patron and ordinary, such lease cannot be supported, as the lessor was never parson ; for none can be parson without presentation or collation (*e*).

During the progress of this part of our subject, frequent allusion has been made to the circumstance of confirmation, as being necessary to the validity of certain ecclesiastical leases ; and, notwithstanding the facilities of leasing afforded by the enabling statutes above noticed have in a great measure superseded the necessity for the confirmation required by the common law, still, as that formality is essential to the leases of parsons and vicars, who are excepted from the act of 32 Hen. 8. c. 28, and other spiritual corporations sole which do not comply with the provisions of such enabling acts, the doctrine retains sufficient importance to demand a detailed examination. The reader, however, will bear in mind that leases at common law only are here referred to.

It is also to be remembered that confirmation, in the sense in which it is here used, signifies an assent to, concurrence in, or approbation of, the grant of another, and may be made either before or after the passing of any interest ; and in this respect is distinguishable from confirmation in its usual meaning, which implies an interest already passed (*f*).

In some cases, the confirmation of the patron is necessary ; in others, it may be dispensed with ; the distinction depending upon the nature of the estate or right vested in the lessor ; thus, such sole corporations as have not the absolute fee and inheritance in them, as prebendaries, parsons, vicars, and the like, cannot make leases at common law, to bind their successors, without the confirmation of the patron ; but such sole corporations as have the whole estate and right in them,

(*e*) Rol. Ab. Confirmation, (F.) pl. 4. Bac. Ab. Leases, (G.) 3. p. 337.

(*f*) Chambers on Leases, p. 277.

as bishops; or such corporations aggregate as have the whole fee and inheritance in them, as dean and chapter, master, fellows, and scholars, of any college, hospital, &c., can, though such bishop, dean, master, &c., be presentable (*g*). The King's confirmation, therefore, though he is patron of all bishoprics, and of most ecclesiastical dignities, is very seldom required (*h*).

The proper parties to confirm the leases of archbishops and bishops, not warranted by any of the statutes above referred to, are their respective deans and chapters (*i*). The confirmation of the King is not necessary (*k*). If a bishop have two chapters, the confirmation of both chapters must be obtained (*l*); but if one dean and chapter surrender their possessions to the King, and then the bishop make a lease, to which confirmation is necessary, and the lease be confirmed by the remaining dean and chapter only, the successor will be bound; because, by the surrender, the one dean and chapter are dissolved, and are as if they had never existed (*m*); and such confirmation will be sufficient, although the dean and chapter so dissolved be again erected (*n*). The bishopric of Waterford and Lismore, being originally two bishoprics distinct, were by lawful authority, in the reign of Edward the 3rd, united and consolidated, but the chapters remained several: after this union, the charter of which was lost, the bishop aliened lands of the see of Waterford (*o*), and aliened lands of the see of Lismore, with the confirmation of the

(*g*) Co. Lit. 300, b. Bac. Ab. Leases, (G.) 2. p. 377. 3 Bos. & Pul. 328.

(*h*) Chamb. on Leases, p. 265.

(*i*) Co. Lit. 300, b. 3 Co. 75, a. Jenk. Cent. 235, case 11. Bishop of Salisbury's case, 10 Co. 60, a. Bishop of Hereford *v.* Seory, Cro. Eliz. 874. Bunny *v.* Wright, 1 Leon. 59.

(*k*) Co. Lit. 301, a. It was said by Boteler, in argument, in Lewis *v.* Adams, 3 July, 1843, before Wigram, V. C., that the leases of bishops did not require confirmation before the 3rd council of Nice, by whose decree they were restrained from aliening their

lands without the confirmation of their chapters.

(*l*) Co. Lit. 300, b. 301, a. Anon. Dy. 58, b. pl. 7. Archbishop of Dublin *v.* Bruerton, 3 Dy. 282, b.; S. C. Jenk. Cent. 235, case 11. Noy, 94. 1 Leon. 234. Latch, 237.

(*m*) Archbishop of Dublin *v.* Bruerton, sup. Co. Lit. 301, a.

(*n*) Bac. Ab. Leases, (G.) 2. p. 379. 1 Rol. Ab. 477. (H.) pl. 5. 6.

(*o*) Qy. With the confirmation of the chapter of Waterford? It is not so stated in the report.

chapter of Lismore; and a question arose, whether such alienations, being without the confirmations of both the deans and chapters, were not voidable by the successor; and it was resolved, that, inasmuch as the usage had been, after the said union, for the several deans and chapters severally to make confirmations, it must be intended that the union was made especially with a view to separate confirmations; particularly when the confusion attendant on a different course, and the remoteness of the deaneries and chapters from each other, were taken into consideration. But, had the union been made generally, and the bishop been eligible by both chapters, the estates made ought to have been confirmed by both chapters (*p*).

If a bishop have no dean and chapter, his leases must be confirmed by the clergy of his diocese (*q*).

Where leases require confirmation by the dean and chapter, the dean himself must join with the chapter; as confirmation by his subdean, deputy, or proctor, will not be sufficient; for though the dean's commissary or deputy may exercise his spiritual jurisdiction, he has no power to charge the possessions of the church (*r*); unless, perhaps, he be invested by the patron or founder of the corporation with authority for that purpose (*s*).

A dean by *recipere in commendam* (*t*), as he holds the

(*p*) The case of the Bishopric of Waterford and Lismore, 12 Co. 71. b.

(*q*) Case of Proxies, or Rex v. Forth, Dav. 1. Rol. Ab. Confirmation, (II) pl. 3. Bac. Ab. Leases, (G) 2. It is related of Ridley, when at the stake, that "then did he move the Lord Williams to intercede that the leases which he had made as bishop of London might be confirmed, and when he had relieved his conscience of this his only worldly care, a kindled faggot was laid at his feet." Blunt's Hist. of the Reformation, p. 292.

(*r*) Bac. Ab. Leases, (G) 2, p. 329. Dean and Chapter of Ferne's case, Dav. 42. 47. Bishop of Litchfield v. Fisher, 2 Dy. 145, b. Anon. Dy. 233, b. pl. (13); S. C. Jenk. Cent. 229,

case 97. Evans v. Aseuith, Askwith, Aseuith, or Aseough, Palm. 457. 461; S. C. W. Jo. 158; Noy, 93-4; Latch, 31. 233; S. C., nom. Vaughan v. Aseue, 2 Rol. 450.

(*s*) Bac. Ab. Leases, (G) 2, p. 380.

(*t*) *Commenda*, or *Ecclesia commendata*, is a living commended by the crown to the care of a clerk, to hold till a proper pastor be provided for it; 1 Bla. Com. 393; and he to whom the church is commended hath the profits thereof only for a certain time, and the nature of the church is not changed thereby. When a parson is made bishop, there is a cession or voidance of his benefice by the promotion; but if the King by special dispensation give him power to retain his benefice,

deanery simply by virtue of the dispensation, and is but a depositary, and not a complete dean, is not competent to confirm the bishop's lease (*u*) ; nor is it settled by whom that duty must in this case be performed. In all probability, by the clergy of the diocese, as in cases where the bishop has no dean and chapter (*x*).

But it is otherwise, where the dispensation is *retinere in commendam* ; for this privilege neither confers a new title on the dean with regard to his deanery, nor deprives him of his former right ; but he continues dean to all intents and purposes ; and, therefore, no disqualification to confirm leases ensues on his being elected bishop, whether of an English or Irish bishopric is immaterial, if previously to consecration he obtain a dispensation *retinere in commendam* (*y*). So, if a bishop, retaining a deanery in commendam, be translated to another bishopric, and, after his election, and before confirmation, obtain a new dispensation to hold the same deanery in commendam with the second bishopric, his old title remains, and confirmations and other acts done by him as dean are as effectual as if he had never been made a bishop (*z*). If the dispensation be deferred till after the consecration, in the case of a newly-created bishop, or, in the case of a translation, till after the bishop be confirmed, it comes too late ;

notwithstanding his promotion, he shall continue parson, and is said to hold it *in commendam*. A commendam *retinere* is for a bishop to retain benefices on his preferment, and these commendams are granted on the King's mandate to the archbishop, expressing his consent, which continues the incumbency, so that there is no occasion for institution. A commendam *recipere* is to take a benefice *de novo* in the bishop's own gift, or in the gift of some other parson, whose consent must be obtained.

No ecclesiastical dignity, office, or benefice, can now be held in commendam by any bishop, unless he held the same at the time of the passing of the

act of 6 & 7 W. 4. c. 77 ; see sect. 18 ; and every commendam thereafter granted, whether to retain or to receive, and whether temporary or perpetual, is thereby declared to be absolutely void. Sect. 18.

(*u*) *Evans v. Ascuithe, Askwith, Ascuth, or Ascough, or Vaughan v. Ascue*, sup. *Thornborough's case*, Bendl. 187.

(*x*) *Bac. Ab. Leases*, (G) 2. p. 380. See ante, p. 294.

(*y*) *Evans v. Askwith, Ascuithe, Ascuth, or Ascough, or Vaughan v. Ascue*, sup. p. 294. note, (*r*) *Thornborough's case*, sup.

(*z*) *Ibid.* *Bac. Ab. Leases*, (G) 2. p. 380.

for the benefice previously holden becomes void by cession immediately on such consecration or confirmation (*a*).

And here may be noticed that a faculty to retain the dignity of the deanery, and to receive the fruits and profits thereof, is tantamount to a dispensation to retain the deanery itself (*b*).

The confirmation by the dean and chapter is testified by their corporate seal being affixed to the lease, an act equivalent to delivery in the case of common persons (*c*); and the seal is *primâ facie* evidence that the confirmation has been fairly obtained; though evidence is admissible to prove the contrary (*d*). An assent given by the dean and by the various members constituting the chapter at different times and places, being but the assent of each individual in his private capacity, will not amount to a confirmation. The performance of this solemn and deliberate act requires the personal presence of the dean and chapter *capitulariter congregati* (*e*); but they are not constrained to assemble in their chapter-house; indeed, the place of meeting, provided it be the same, is unimportant (*f*).

Nor is it required that the consent of every member be obtained: provided the majority confirm, the lease is good, notwithstanding the absence or positive dissent of the minority (*g*). Were it otherwise, the corruption or perverseness of one or two members might prejudice the whole corporation (*h*). But by usage, a chapter may be held without a majority of the whole body (*i*).

Though, of common right, the assent of the majority was

(*a*) Ibid.

(*b*) Ibid. Palm. 476.

(*c*) The case of the Dean and Chapter of Fernes, Dav. 42, b. Bac. Ab. Leases, (G) 2. p. 332. Rol. Ab. Faits, (1) pl. 4.

(*d*) Dr. Harscot's case, Comb. 202.

(*e*) Dean and Chapter of Ferne's case, Dav. 42, b. Evans v. Askwith, Ascuthe, Asciuth, or Ascough, or Vaughan v. Asene, sup. Bishop of

Litchfield v. Fisher, 2 Dy. 145, b. and marg. But see 3 Dy. 232, b. marg.

(*f*) Ibid. And see 3 Dy. 273, b. marg.

(*g*) Dr. Harscot's case, Comb. 202. Bac. Ab. Leases, (G) 2. p. 330. See also the preamble to the statute of 33 Hen. 8. c. 27.

(*h*) Ibid.

(*i*) Dr. Harscot's case, sup.

required, a practice prevailed, on the new foundation by an individual of a hospital, college, deanery, or other corporation, of providing, among their peculiar acts, local statutes, and ordinances, that the disagreement of any one of such corporation, having power to assent or dissent, should annul the power of the others to grant leases, the observance of such ordinances being moreover enforced by the obligation of an oath. To obviate this irregularity, and promote conformity with the usages of the common law, the statute of 33 H. 8. c. 27 (*k*), invalidated every peculiar act, order, rule, and statute, then made, or thereafter to be made, which might prevent the granting of leases by the governor or ruler of such hospital, college, deanery, or other corporation, with the consent of the major part of such hospital, &c., privileged to give or withhold their consent: and declared that all oaths theretofore taken for the observance of such statutes or rules should be void; and prohibited, under a penalty of 5*l.* for every offence, the giving of such oaths in future.

In order to ascertain by whom a dean's leases must be confirmed, it is necessary to distinguish the cases in which he is solely seised, from those in which the dean and chapter are seised jointly.

In the latter case, the dean and chapter may grant leases without the confirmation of any person (*l*); but they must all join in the grant: the mere assent of the chapters, and the annexation of the corporate seal to the lease of the dean, will not answer the purpose; for the estate is vested in them jointly with the dean (*m*). Nor will the confirmation of such a lease by the chapter by a distinct deed render it valid; for they constitute but one entire body, and therefore cannot sever in their acts; but the concurrence of all of them in a confirmation after such lease will amount to a new demise (*n*).

Where the dean is solely seised, his leases must be confirmed by the chapter; but it seems doubtful whether the

(*k*) 33 Hen. 8. c. 27.

(*l*) 3 Bac. Ab. Leases, (G) 1. 2.

Lit. s. 652.

(*m*) Chafyn de Meere's case, Dy. 40, b. Rol. Ab. 478 (K) pl. 4.

(*n*) 1 Dy. 40, b. marg.

concurrence of the bishop, as well as of the chapter, must be obtained. The early cases, though not expressly deciding the point, appear to negative the necessity for his confirmation. For instance, in *Chafyn de Meere's case* (*o*), the dean of Salisbury made a lease of the parsonage of Meere, with the consent of the whole chapter; and the court held, that, if the dean and chapter together were parsons *imparsonées*, the lease was void, because all of them were capable by law of making a lease, or being impleaded; but it was otherwise if the dean alone in right of his deanery was parson, for then he alone was the lessor, and the chapter only assentors.

The like inference is justified by the case of *Walrond v. Pollard* (*p*). The deanery of the cathedral church of Wells was dissolved by surrender, the dissolution was confirmed by act of parliament, and a new deanery was erected by the act, and to the King was given the nomination by letters patent of the new dean and his successors: the court were of opinion that the King's confirmation was not necessary, for the words of the act were, that the new dean and his successors might grant, demise, and depart with their possessions, in the same manner and form as the ancient deans might and used to do, which, they said, never was to have the confirmation of the bishop, but only of the chapter. This case, it is said, cannot be considered as a direct authority against the necessity for the bishop's concurrence, as it depended on special circumstances (*q*); but, supposing the bishop's confirmation to have been essential in the generality of cases, it is strange that no notice is taken in the report of the peculiar ground on which the deans of Wells originally claimed exemption from the general rule of law.

So in *Haley v. Rownd* (*r*), the dean of Sarum, seised of the

(*o*) 1 Dy. 40, b. See also *Jenk. Cent.* 235, case 11.

(*p*) *Walrond v. Pollard*, 3 Dy. 273, a. *Mirehouse*, in his treatise on *Advowsons*, p. 33, states, that all deaneries are subject to episcopal visitation, and that the grants of any of their possessions must be confirmed by the bishop

and chapter; and in support of his position refers to *Goodman's case*, Dy. 272, meaning, no doubt, *Walrond v. Pollard*, *sup.*

(*q*) *Chamb. on Leases*, p. 267.

(*r*) *Haley v. Rownd*, 3 Dy. 349, b.; *S. C. Bent*, 233.

rectory of Sonning in right of his deanery, leased 200 acres thereof for the term of sixty years, and the lease was confirmed by the dean and chapter. The case was determined without reference to the question in discussion; but no objection was taken to the lease on account of its not being confirmed by the bishop.

And Rolle, in his Abridgment (s), asserts, without qualification, that the assent of the chapter is a sufficient confirmation, as the dean solely has the estate; and he adds, somewhat inconclusively perhaps, that the writ *de sine assensu capituli* (t) would prove that only one assent is necessary.

These cases, therefore, if not decisively in favor of the validity of the dean's lease, though it be not confirmed by the bishop, require strong authority to establish an opposite doctrine.

It appears, indeed, that Lord Chief Baron Gilbert was inclined to a different opinion (u). That learned judge, after noticing that several books seemed to hold that the confirmation of the chapter alone, without the bishop, was sufficient to make good the dean's leases or grants that needed confirmation, observed, "but yet it is laid down as a rule in the Parson's Counsellor (x), that the bishop's confirmation, as well as the chapter's, is necessary to all leases and grants made by the dean; and what is said by Fitzherbert (y), that the bishop and chapter are in law looked upon but as one body, seems also to favor this opinion; for it is reasonable that the whole body should consent to the granting of their possessions, and not that the bishop, who is the head of the body, should be unconcerned therein: also the possessions of the dean are said to be derived from, and carved out of, the bishopric; and the bishop *de jure* is said to be patron of the deanery; which are all strong arguments to prove the bishop's confirmation necessary; though no book case can be

(s) 1 Rol. Ab. 478 (K) pl. 1. And see Plowd. 538.

(t) F. N. B. 194; and, 7th ed., 450.

(u) 11 Bac. Ab. Leases, (G) 2. p. 378.

(x) Degge, 120.

(y) F. N. B. 194. and p. 451, 7th edit.

found expressly to warrant it, but rather the contrary, as appears by the cases first cited (*z*), wherein no notice is taken of the bishop's confirmation, or that it is necessary." The passage concludes with, *ideo quære*.

It is clear that the King's confirmation is not necessary, unless the deanery be merely donative, in which case his consent and confirmation, as patron, must be obtained; and this without the bishop's confirmation is sufficient, as in all other donatives, with which the bishop has nothing to do (*a*).

The distinction between the sole seisin of the dean, in right of his deanery, and his seisin jointly with his chapter, leads to the consequence, that, in the former case, the assent of the chapter is all that is required of them; and if that be obtained, and their common seal be annexed to the deed, their concurrence in the operative or granting part of the lease may be dispensed with; but, in the latter, as the chapter have an equal interest in the lands, and constitute but one body in law, they, as well as the dean, must be granting parties, and a mere consent will not be sufficient (*b*).

Prebendal leases, when they need confirmation, must be confirmed by the bishop, dean, and chapter (*c*). The bishop's concurrence is requisite because he is the patron and ordinary of every prebend (*d*); and that of the dean and chapter, because the patronage constitutes part of the possessions of the bishopric, of which the bishop cannot dispose without their consent (*e*). But it is observable, that if he alone confirm the lease, and, on the prebendary's death, collate another to the benefice, the new incumbent cannot avoid the lease, because he derives his interest purely from the collation of the bishop, as patron and ordinary, without any aid or con-

(*z*) Being the cases noticed above.

(*a*) Bac. Ab. Leases, (G) 2. p. 378. Rol. Ab. Confirmation, (R.) pl. 1. Walrond v. Pollard, 3 Dy. 273, a. b.

(*b*) Chafyn de Meere's case, 1 Dy. 40, b. Plowd. 199. Ireland v. Barker, Godb. 210. 2 Leon. 176. Clark's case, 1 Leon. 11.

(*c*) Jenk. Cent. 235, case 11. Anon.

Dy. 61, b. pl. (30). Hodgeskiss v. Tucker, 2 Dy. 239, a. b.; S. C. Benl. 80. pl. 126. Champion's case, 1 Dy. 106, b.

(*d*) Ibid. 1 Rol. Ab. 481, Confirmation, (P) pl. 3. Dy. 61, b. pl. (30).

(*e*) 1 Rol. Ab. 479, (M) pl. 2; 481, (P) pl. 1. Smith v. Bowles, 3 Bulstr. 290.

currence of the dean and chapter (*f*). If even the bishop be translated, or resign, or be deprived of his bishopric, the leases confirmed by him alone will, during his life, bind the succeeding bishop and his incumbent; but on his death they are at an end (*g*).

Where a rectory within the diocese of Exeter had, by the grant of King Henry the 2nd, and of the bishop of Exeter, been annexed to, and become parcel of, the prebend of Salisbury, it was held, that a lease by the prebendary, confirmed by the bishop of Salisbury and the dean and chapter of Salisbury, though not by the bishop of Exeter, was good; for although he was inducted by the latter, yet he was instituted by the former, and swore to him the oath of canonical obedience (*h*).

The leases of archdeacons and canons must, in like manner, be confirmed by the bishop, dean, and chapter (*i*).

Leases by parsons and vicars who, as we may remember (*k*), were specially excluded from the benefits of the enabling statute of 32 Hen. 8. c. 28, in general require no other confirmation than that of the patron of the living, and of the bishop of the diocese (*l*). The parson is the only granting or leasing party; the patron and ordinary, who have no real interest in the lands, though the law considers it expedient to require their concurrence, express their consent in the body of the deed, and affix their respective seals in evidence of the fact (*m*).

If the bishop be patron of the church, in right of his bishopric, and ordinary also, the confirmation of the dean and chapter must be obtained; as the advowson of the church constitutes parcel of the bishopric, and cannot be charged by

(*f*) Ibid. Anon. 3 Dy. 356, b. pl. (42). Co. Lit. 329, a. Bac. Ab. Leases, (G) 2. p. 376. 1 Leon. 235.

(*g*) Bac. Ab. Leases, (G) 2. p. 376-7.

(*h*) *Gie v. Rider*, 1 Sid. 75; S. C. nom. *Jay v. Ryder*, 1 Keb. 280. *Leigh v. Hellier*, Rol. Ab. Confirmation, (L). *Herbert v. Munday*, Cro. Eliz. 587.

(*i*) Bac. Ab. Leases, (G) 2. p. 376.

(*k*) Ante, p. 239.

(*l*) Co. Lit. 300, b. 3 Bos. & Pul. 328. See 5 & 6 Vict. c. 108, s. 20, which requires, in the particular cases there provided for, the consent of the patron and ecclesiastical commissioners for England. See ante, p. 279.

(*m*) Bac. Ab. Leases, (G) 2. p. 383.

the bishop, to the prejudice of his successor, without such confirmation (*n*). Nor, on the other hand, can the confirmation by the dean and chapter, without that of the bishop, where he is patron as well as ordinary, avail against the succeeding collatee; for he claims his benefice under a title unconnected with, and independent of, their assent or concurrence (*o*). Thus, one Rawlings, then formerly a provost in the cathedral church of Wells, being parson imparsonée of the parsonage of Winsame, made a lease, before the statute of 13 Eliz. c. 10, of the land and tithes of the parsonage for fifty years to one Tucker, rendering rent; and the lease was confirmed by the dean and chapter, but not by the bishop, who was patron^{and} and ordinary; and, the deanery of Wells being afterwards dissolved, and a new deanery erected by act of parliament, it was declared that the same provostship should be united to the new deanery whenever it should become vacant. On the death of Rawlings, the provost and lessor, the first dean of the new erection, after acceptance of rent from Tucker, made a new lease, before the 13th of Eliz., of the said land and tithes for sixty years, with the confirmation of the bishop, and of the dean and chapter also; and the court held, that the lease of the provost was not voidable only, but actually void and determined by his death, notwithstanding the acceptance of rent by the new dean; because the bishop of the diocese had not confirmed it (*p*).

But if the bishop only, being patron as well as ordinary, confirm the lease of the parson, and upon his death the bishop collate another to the living, the new incumbent cannot avoid his predecessor's lease, notwithstanding its want of confirmation by the dean and chapter; for, deriving his interest solely from the bishop, he is bound by what his patron had previously done (*q*). The law is the same whether the lease be made by a parson, vicar, dean, archdeacon, or prebendary (*r*).

(*n*) Co. Lit. 300, b. 3 Dy. 356, b. Rol. Ab. Confirmation, (P) pl. 1.

(*o*) Bac. Ab. Leases, (G) 2. p. 376.

(*p*) *Hodgeskins v. Tucker*, 2 Dy. 239, a.; S. C. Benl. 80, pl. 126.

(*q*) Anon. Dy. 356, b. pl. (42). Co. Lit. 329, a. 1 Leon. 235. *Smith v. Bowles*, 1 Rol. Ab. 479, Confirmation, (M), pl. 3.

(*r*) *Ibid*.

In case the bishop be translated, or resign, or be deprived of his bishopric, his confirmation, without that of the dean and chapter, will bind his successor, during his (the bishop's) life (*s*); but, having no power to charge the possessions of the bishopric for a longer period than his own life, without their consent, the sole confirmation of the bishop must necessarily determine on his death (*t*). *

The confirmation of the dean and chapter is not necessary to a lease by a parson or vicar (*u*).

It is to be observed, that the distinction before taken (*x*) between dispensations *recipere* in commendam, and *retinere* in commendam, is as applicable to bishoprics as to deaneries (*y*). A mere commendatory bishop in the *recipere* cannot confirm leases; but, in such case, the duty devolves on the archbishop (*z*). The suffragans, commissaries, or deputies, of bishops, and guardians of the spiritualities during a vacancy, are subject to the same disability (*a*).

Where there is a patron paramount, as well as an immediate patron, confirmation by the latter only is not good: for example, if a parson, being patron in right of his parsonage of S., present B., a lease by B., confirmed by the patron and ordinary, is not good, unless it be also confirmed by the patron of the rectory; because both have an interest in the possessions of the church of S. (*b*). But where a parsonage within the diocese of Winton was annexed to a prebend in Sarum, it was held, that a lease made by the prebendary, with the confirmation of the bishop, dean, and chapter, of Sarum, could not be avoided for want of confirmation by the bishop of Winton (*c*).

If the parsonage or vicarage be donative, no other confirmation than that of the patron is required (*d*).

(*s*) Bac. Ab. Leases, (G) 2. Co. Lit. 300, b.

(*t*) Ibid.

(*u*) Co. Lit. 300, b. 1 Rol. Ab. 481. Confirmation, (Q). pl. 2. Bro. Ab. Leases, pl. 64.

(*x*) Ante, p. 294-5.

(*y*) Bac. Ab. Leases, (G) 2. p. 380.

(*z*) Ibid.

(*a*) Latch, 237.

(*b*) Co. Lit. 300, b. Bac. Ab. Leases, (G) 2. p. 377.

(*c*) Herbert v. Munday, Cro. Eliz. 587. Jay v. Ryder, 1 Keb. 230; S. C., nom. Gie v. Rider, Sid. 75. Leigh v. Hellier, Rol. Ab. Confirmation, (L).

(*d*) Rol. Ab. Confirmation, (R) pl. 1. Co. Lit. 344, a.

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A lease by a perpetual curate of land annexed to his curacy by the governors of Queen Anne's Bounty, under 2 stat. 1 Geo. 1. (*e*), requires the confirmation of the ordinary as well as that of the patron (*f*).

A confirmation may arise by construction of law, as well as by the direct act of the party. Thus, where a parson demised his rectory to W. H., then patron of the same rectory, and he assigned the lease, with the confirmation of the bishop, it was held, that the assignment imported in itself a confirmation of the term; because, a confirmation being but an assent under the hand and seal of the party confirming, such assent was manifested by the fact of assigning over (*g*). But the mere acceptance by the patron of a lease from the incumbent will not amount to a confirmation (*h*).

Where the parties required to confirm constitute a corporation aggregate, as a dean and chapter, warden and college, mayor and commonalty, it is not necessary in the deed of confirmation to mention either the christian or surname of the head of the corporation; for, on his death, his place is supplied by the successor, without any extinguishment of the functions of the corporate body (*i*). But where the corporation consists of a single person, as a bishop, dean, &c., his christian name at least should be mentioned, that it may appear in whose time the confirmation was made (*k*).

As the confirmation is in truth no more than an assent, it is immaterial whether it precede, or be given subsequently to, the demise (*l*); and if the deed of confirmation bear date before the lease intended to be confirmed, but by agreement

(*e*) 2 stat. 1 Geo. 1. c. 10. ss. 4, & 21.

(*f*) *Doe dem. Richardson v. Thomas*, 9 Adol. & Ell. 556; S. C. 1 Per. & Dav. 578.

(*g*) *Hodges v. Newcomen*, cited, 5 Co. 15, a.; and 3 Bulstr. 238. *Maund, or Mawde, v. French*, 1 Rol. 361; 2 Rol. 8; S. C., nom. *Mande v. French*, J. Bridgm. 92. Co. Lit. 301, b.

(*h*) *Ibid.* Rol. Ab. Confirmation, (O) pl. 6.

(*i*) *The Dean & Chapter of Bristol v. Clerke, or The Serjeants' Case*, Dy. 33, a. 36, a. b. *Champion's case*, Dy. 106, b. *Carter v. Claycole*, 1 Leon. 306; S. C., nom. *Carter v. Crumwell*, 1 And. 248.

(*k*) *Ibid.*

(*l*) Co. Lit. 300, b. *Anon.* 3 Leon. 17, case 40, *per* Catline, Southcote, and Whiddon, against Wray; S. C. Ow. 33.

the deed confirmed be first delivered, the confirmation is good (*m*).

Rolle, however, in his Abridgment (*n*), advances a contrary doctrine. It is there laid down, that confirmation made and delivered before the parson's grant is not good; and that the confirmation in this case, though again delivered after the grant, will be inoperative; as it was a deed by the first delivery, and the second delivery could not amount to an assent, because the assent must be given by deed. But this position does not appear to be entitled to much weight. The other cases, observes C. B. Gilbert (*o*), are express, and the reason of the thing seems likewise to make for it; for the confirmation being nothing but an assent or agreement that the bishop or parson may make such lease, when this assent appears, and a lease be made pursuant to it, there can be no reason to impeach the lease after, which has all the sanction that the law requires, viz., the concurrence and assent of the persons appointed by law to that purpose, and before or after are only circumstances of time, which seem not material when the assent, which is the substance, sufficiently appears.

We therefore find, that if a lease be made by a bishop on the 2nd of May, and confirmed by the dean and chapter on the 1st (*p*); or if it be made on the 2nd day of May, and confirmed on the 3rd, and sealed on the 4th (*q*); in either case, the confirmation is good. So, where a bishop granted a lease for years to the King, and the dean and chapter confirmed it before enrolment, this was held to be a good confirmation, although the lease was not *in esse* at the time (*r*). So, where a bishop, before the restraining statutes, made a charter of feoffment, with a letter of attorney to make livery, and before livery the dean and chapter confirmed the deed,

(*m*) Bac. Ab. Leases, (G) 4. p. 338.

(*q*) Bac. Ab. Leases, (G) 4. p. 338.

(*n*) Rol. Ab. 480, Confirmation, (O).
pl. 4. 5.

(*r*) 1 Rol. Ab. 478, Confirmation, (H).
pl. 7. Co. Lit. 301, a. Palm. 466.

(*o*) Bac. Ab. Leases, (G) 4. p. 308-9.

Latch. 240.

(*p*) Anon. Ow. 33. Co. Lit. 300, b.

the confirmation was sufficient, and livery made afterwards was good (*s*).

So, where a bishop granted a lease for years with the confirmation of the dean and chapter, and afterwards granted a reversionary lease of the same land to another for twenty years, and then, before confirmation, granted a lease of the same lands to a third person for sixty years, to commence immediately; and the last lease was first confirmed, and then the reversionary lease was confirmed, the reversionary lease was preferred to the last; for no estate passed by the confirmation, the object of which was to render durable and effectual the interest already vested in the lessee (*t*).

A lease made by a parson before the statute of 13 Eliz. c. 10, for a greater number of years than that act allows, but not confirmed till after it, was held to be good; for the act referred to future alienations by incumbents, and not to their existing leases; nor to confirmations after the statute of leases made before it (*u*).

The period within which confirmation of the leases of parsons and others not absolutely seised of the fee-simple of the ecclesiastical possessions must be obtained is confined to the lifetime and incumbency of the lessor; for after his death, resignation, deprivation, or other amotion, the lease becomes void for want of confirmation (*x*). Nor can subsequent confirmation revive it, though made in the vacation before any successor comes in (*y*). But confirmation of a parson's lease may be obtained at any time during the incumbency, although neither of the confirming parties was bishop or patron at the time of the lease (*z*).

(*s*) *Ibid.* And see *Dimmock's* or *Dymmock's* case, *Hob.* 136; *S. C. Cro. Jac.* 408.

(*t*) *Mo.* 66. pl. 180. *Cro. Eliz.* 430.

(*u*) *Higgins v. Grant*, *Cro. Eliz.* 18. *Denny v. Eakenstall*, *Cro. Eliz.* 430; *S. C.*, *nom.* *Arkingsal v. Denny*, *Mo.* 459. pl. 636. *Newcomen's* case, cited, 1 *Roll.* 171. *Bridgm.* 83. 5 *Co.* 15. a. *Freche's* case, cited, *Cro. Jac.* 53.

(*v*) *Co. Lit.* 301, a. 341, b. *Bac. Ab. Leases*, (G) 4. p. 389. *Herreyong* and *Goddard's* case, *Dy.* 46, a. *Hodgeskins v. Tucker*, 2 *Dy.* 239, a.; *S. C. Benl.* 80. pl. 126. *Higgins v. Grant*, *Cro. Eliz.* 18. *Johnson's* case, *Hetl.* 88.

(*y*) *Ibid.*

(*z*) *Banister's* case, *Cro. Car.* 38. 2 *Dy.* 239, b. marg.

Some of the cases (*a*), however, draw a distinction between a chattel, and a freehold lease, and maintain that the latter are voidable only by the entry of the succeeding incumbent, and not void.

The patron's confirmation cannot endure for a longer period than the continuance of his estate. Thus, if his estate be conditional upon his performing some act, and after confirming the incumbent's lease, the condition be broken, the confirmation is determined (*b*). So, if the patron be tenant for life, or in tail, his confirmation will not be binding on his successor after his death, but on such only as come into the church during his life (*c*); and, therefore, the presentee of a remainder-man or reversioner after the death of a tenant for life, or of issue in tail after the death of his ancestor, may avoid the lease so confirmed by the tenant for life or in tail (*d*). And even if the son and heir apparent of the tenant in tail of an advowson join with his father in the confirmation, he will not be bound, as he has no interest at the time (*e*). But a disentailment of the estate tail will of course preclude the issue from disturbing the lessee (*f*). So, formerly, where a tenant in tail discontinued the estate tail, the lease confirmed by him could not be avoided during the discontinuance (*g*).

So, where husband and wife, being patrons in right of the wife, confirm a lease made by the parson, she will not be bound by the confirmation in case of her surviving her husband, for her mere deed during coverture is voidable, if not void (*h*): though, without doubt, the husband will be

(*a*) *Hodgeskins v. Tucker*, 2 Dy. 239, a. b.; S. C. Benl. 80. pl. 126.

(*b*) Co. Lit. 300, b.

(*c*) Ibid. Lit. s. 523. *Lancaster v. Lucas*, 1 Leon. 234. *Maund, or Mawde, v. French*, 1 Rol. 36; 2 Rol. 8; *J. Bridgn. 92. Rol. Ab. Confirmation*, (N). pl. 2.

(*d*) Ibid. *Stebbing v. —*, 3 Dy. 252, a.

(*e*) 1 Rol. Ab. 482, Confirmation, (S) pl. 2. And see *Sir Marmaduke Wivel's case*, Hob. 45; S. C., nom.

Wivel v. Bishop of Chester, 1 Brownl. 165.

(*f*) Co. Lit. 300, b. *Bac. Ab. Leases*, (G) 3. p. 335. *Stebbing v. —*, 3 Dy. 252, a.

(*g*) Ibid. Discontinuances are now at an end. See 3 & 4 W. 4. c. 27, and 8 & 9 Vict. c. 106.

(*h*) 1 Rol. Ab. 479, Confirmation, (N) pl. 1. *Lancaster v. Lucas*, 1 Leon. 233. *Anon. Dy. 133, a.* And see as to leases by husband and wife, ante, p. 133, *et seq.*

bound, if he survive, and be entitled as tenant by the curtesy (*i*).

On the same principle, if the patron, previously to confirming his incumbent's lease, grant the next avoidance to another, the presentee of the grantee may defeat the lease, unless the grantee also confirm it (*k*). And when once defeated, no future circumstance can revive it as against a succeeding incumbent; although he be presented by the very patron by whom it had previously been confirmed (*l*).

If the patronage reside in three coparceners, or tenants in common, all must join in confirming the parson's lease, to render it binding on the next incumbent, because they constitute but one patron (*m*). But if the parson make a lease for years, which is confirmed by the ordinary and one only of two patrons of the church, and after the parson's death the ordinary collate by lapse, it appears that such confirmation will be good against the collatee (*n*).

If there be a composition to present by turns, it is doubtful whether a lease confirmed by him who has the next turn will bind his presentee (*o*).

The confirmation need not be for the entire term granted by the lease, but may embrace a portion of the years only. To effect the latter object, however, proper words are necessary; for if a lease requiring confirmation be granted for twenty-one years, and the parties possessing the right of confirming confirm the *demise*, or the *grant*, or the *term*, or the *estate*, each of which is in itself entire, for seven years only, and no more, the confirmation will extend to the whole term; for the words of qualification are repugnant, and incapable of confirming a lease and term of twenty-one years

(*i*) Co. Lit. 29, a. 166, b.

(*k*) Anon. Dy. 72, b. pl. (5); and *Ibid.* marg.; cited, Mo. 481. Earl of Bedford's case, 7 Co. 3, a. Oldfield v. Plowden, W. Jo. 454; Plowden v. Oldford, Cro. Car. 532. Spendlowes v. Burket, Hob. 7. Anon. 2 Dy. 133, a. pl. (1). Anon. Mo. 66. pl. 130.

(*l*) *Ibid.* Bac. Ab. Leases, (G) 3. p. 386.

(*m*) Bac. Ab. Leases, (G) 3. p. 386.

(*n*) *Ibid.* Lancaster v. Lucas, 1 Leon. 233. The case was adjourned; but see Dy. 72, b. marg. (5).

(*o*) Bac. Ab. Leases, (G) 3. p. 386. Lancaster v. Lucas, 1 Leon. 234.

for seven years (*p*). But the confirming parties may, without inconsistency, confirm *the land*, or part of the land, as one or more acres, for a shorter period than the term granted, or with a condition annexed (*q*).

But if the lease be for a life or lives, instead of years, it appears that the confirmation cannot be apportioned (*r*).

The leases of bishops and deans, who have the absolute fee in themselves, made without the requisite confirmation, do not appear to become absolutely void on their death or removal; but are voidable only by the successor; and, hence, may be established by the successor's acceptance of rent from the lessee (*s*).

The statute of 13 Eliz. (*t*), which avoided leases of benefices or ecclesiastical promotions with cure, and not appropriated, by the residence of the lessor from his benefice for above fourscore days in the year; and the acts of 14 Eliz. c. 11, and 18 Eliz. c. 11, and 43 Eliz. c. 9, by which it was continued, explained, and amended, and the act of 3 Car. 1. c. 4, by which these acts were made perpetual, were repealed by the act of 43 Geo. 3. c. 84. s. 10, which, together with the other acts just noticed, was repealed by an act of 57 Geo. 3 (*u*). This, in its turn, except so far as it repealed the other acts, was repealed by 1 & 2 Vict. c. 106, by which (*v*) any agreement for the letting of the house of residence, or the buildings, gardens, orchards, or appurtenances, necessary for the convenient occupation of the same, belonging to any benefice, to which house of residence any spiritual person may be

(*p*) Foord's case, 5 Co. 81, a.; S. C., nom. Belford v. Foord, Cro. Eliz. 447, and nom. Betford v. Ford, Cro. Eliz. 472, the second page of that number. Anon. 1 And. 47. case 119. Tomlinson's case, Hetl. 75. Anon. 3 Dy. 338, b. pl. 43; S. C. Benl. 238. pl. 265. Fitzwilliam's case, Dy. 52, b. pl. (4). Winch, 95. Lloyd v. Wilkinson, Mo. 481. Co. Lit. 297, a.

(*q*) Ibid. Bac. Ab. Leases, (G) 2. p. 384. And see Lord Willoughby v.

Foster, 1 Dy. 80, b.

(*r*) 5 Co. 82, a. Co. Lit. 297, a.

(*s*) Grindal's case, 4 Leon. 78. Overton v. Sydall, Poph. 120-1. Co. Lit. 45, b. Bro. Ab. Acceptance, pl. 20. Confirmation, pl. 17. Lease, pl. 18. 32. Plowd. 264. And see Herreyong v. Goddard, Dy. 46, a. Hardr. 156. Rickman v. Garth, Cro. Jac. 173.

(*t*) 13 Eliz. c. 20.

(*u*) 57 Geo. 3. c. 99.

(*v*) 1 & 2 Vict. c. 106. s. 59.

required by order of the bishop (*w*) to proceed, and to reside therein, or which may be assigned or appointed as a residence to any curate by the bishop, is directed to be made in writing, and to contain a condition for avoiding the same upon a copy of such order, assignment, or appointment, being served upon the occupier, or left at the house, and otherwise to be null and void; and a tenant holding possession after service of a copy of the order, assignment, or appointment, is not only made liable to a penalty of 40*s.* a day during the continuance of such adverse possession, but may be summarily ejected by a peace-officer, on a warrant to be obtained by the spiritual person from any justice of the peace having jurisdiction in the place.

A contract by a parson to grant a lease of his ecclesiastical possessions is broken by his resignation (*x*).

A book in which leases were enrolled, and which was kept in the office of the auditor of the bishop of Durham, (such officer holding a patent office in the county palatine,) was held to be admissible in evidence to sustain the claims of a lessee of the bishop of Durham, the original and counterpart of the lease being lost (*y*).

Notwithstanding the various alterations, great and important as they are, effected by the acts of parliament passed of late years, and noticed above, the system of leasing by ecclesiastical bodies is still considered by many persons competent to form an opinion (*z*) to be unsound and unsatisfactory, whether looked upon with reference to the interests of the contracting parties, or its effect upon agricultural and other improvement; and more sweeping changes have in consequence been contemplated. The select committee on church leases, after specifying the evils of the existing mode, conclude their report in 1839 by recommending,

(*w*) See Sect. 54.

(*x*) *Rudge v. Thomas*, 3 Bulstr. 202.

Price v. Williams, 1 Mees. & Wels. 6.

(*y*) *Humble v. Hunt*, Holt's N. P. C. 601.

(*z*) See the report of the Select Committee on Church Leases, and the minutes of evidence ordered by the House of Commons to be printed, 6 May, 1839.

1. The abolition of the injurious system of fines upon leases for lives, and also upon leases for terms.

2. The substitution of a fee-simple, for a leasehold tenure, throughout the property of the church.

3. An act to provide for the conversion of church leasehold into fee-simple, commonly called enfranchisement.

4. The customary confidence of renewal by the lessee to be considered according to local circumstances, by the authorities established under the proposed act, in the principles of enfranchisement laid down by them: and,

5. The interests of the church, present as well as future, to be provided for by a combined system of money payments and corn rent-charges.

As this report was made before the acts of 5 Vict. sess. 2. c. 27 (*a*), and 5 & 6 Vict. c. 108 (*b*), were passed, it is clear that the legislature were indisposed to go the length recommended by the committee.

The ecclesiastical commissioners for England, however, who are under no legislative or other restraint upon their powers of leasing property vested in them in their corporate capacity, passed, at a meeting held on the 15th of April, 1845, the following resolutions respecting such property:—

1. That no lease for lives be renewed by the addition of a new life, nor any lease whatever upon consideration of a fine.

2. That no estate which is subject to a lease when it becomes vested in the commissioners shall at any time be sold to any other than the person beneficially interested under the existing lease, until he shall have had the option of becoming the purchaser.

3. That every estate already and hereafter vested in the commissioners shall at the first convenient opportunity be surveyed, and a full report made of its value, and of its circumstances, with reference to the relative advantage of retaining or parting with it.

4. That the commissioners, having taken such report into consideration, shall, unless they find special reasons for not

(*a*) Ante, p. 257.

(*b*) Ante, p. 269.

parting with the property, hold themselves prepared to entertain an offer for the purchase of the reversion from the person beneficially interested in the lease.

5. That in all cases of the commissioners declining to sell, an entry shall be made upon their minutes of the special reasons for their so declining.

6. That the price of the reversion shall be, as a general rule, the amount of the difference between the value of the whole fee, calculated as if the estate were actually in possession, and the value of the leasehold interest.

7. That, whether the commissioners for any special reasons decline to sell, or the lessee decline to purchase, the reversion, the commissioners shall hold themselves prepared, in any case, to purchase the leasehold interest at its market price, if the lessee be willing to sell the same.

8. That in any case in which the lessee shall have declined either to purchase the reversion, or to sell his leasehold interest, the commissioners shall consider themselves free from any restraint respecting the sale or letting of the property.

9. That tithes, and lands or other hereditaments allotted or assigned in lieu of tithes, vested in the commissioners, shall not in any case be sold until due consideration shall have been had of the wants and circumstances of the places in which such tithes arise or have heretofore arisen.

v.—*Municipal Corporations.*

At common law, municipal corporations had the same unlimited right of alienation of their corporate estates as private individuals (*c*). But some restraints were imposed upon their powers by the late municipal corporations act (*d*).

(*c*) Jenk. Cent. 270, case 88. Smith v. Barrett, 1 Sid. 162. Attorney-General v. Lord Gore, Barnard. Ch. 145. Gozsa v. The Alderman and Burgesses of Grantham, 3 Russ. 261.

(*d*) 5 & 6 W. 4, c. 76, entitled, "An Act to provide for the regulation of Municipal Corporations in England and Wales." Royal Assent, 9 Sept. 1835.

We may first mention that it was thereby enacted (*e*), that after the first election of councillors thereunder in any borough (*f*), the body or reputed body corporate named in the schedules (A) and (B), in connection with such borough, should take and bear the name of the “mayor, aldermen, and burgesses” of such borough, and by that name should have perpetual succession, and should be capable in law, by the council thereafter mentioned (*g*) of such borough, to do and suffer all acts which then lawfully they and their successors respectively might do and suffer by any name or title of incorporation; and that the mayor of each of the said boroughs should be capable in law to do and suffer all acts which the chief officer of such borough might then lawfully do and suffer, so far as the same respectively were not altered or annulled by the provisions thereof.

It was then enacted (*h*), that it should not be lawful for the council of any body corporate (*i*) to be elected thereunder to demise or lease, except in pursuance of some covenant, contract, or agreement, *bonâ fide* made or entered into on or before the 5th day of June, 1835, by, or on the behalf of, such body corporate, or in pursuance of some resolutions duly entered in the corporation books of such body corporate on or before the said 5th day of June, or except in the cases thereafter mentioned, any lands, tenements, or hereditaments, of such body corporate, or any part thereof, or to enter into any new covenant, contract, or agreement, (except in the cases thereafter mentioned,) for demising or leasing any such lands, tenements, or hereditaments, or any part thereof, for any term exceeding thirty-one years from the time when such lease should be made, or if made in pursuance of a previous agreement, then from the time when such agreement should have been entered into; and that in every

(*e*) Sect. 6.

(*h*) Sect. 94.

(*f*) “Borough” is to be construed to mean, city, borough, port, cinque port, or town corporate, named in one of the schedules (A) and (B). Sect. 142.

(*i*) “Body corporate” is throughout the act to be construed to mean any body corporate named in the schedules (A) and (B). Sect. 142.

(*g*) See ss. 25, & 69.

lease which the said council was not thereby restrained from making there should (except in the cases thereafter mentioned) be reserved and made payable, during the whole of the term thereby granted, such clear yearly rent as to the council should appear reasonable, without taking any fine for the same: provided nevertheless, that in every case in which such council should deem it expedient to demise and lease, for a longer term than thirty-one years, or upon different terms and conditions than those thereinbefore mentioned, any of the said lands, tenements, or hereditaments, it should be lawful for such council to represent the circumstances of the case to the lords commissioners of his Majesty's treasury; and that it should be lawful for such council, with the approbation of the said lords commissioners, or any three of them, to demise any of the lands, tenements, and hereditaments, of the said body corporate, in such manner, and on such terms and conditions, as should have been approved by the said lords commissioners; provided always, that notice of the intention of the council to make such application should be fixed on the outer door of the town-hall, or in some public and conspicuous place within the borough, one calendar month at least before such application, and that a copy of the memorial intended to be sent to the said lords commissioners should be kept in the town clerk's office during such calendar month, and should be freely open to the inspection of every burgess at all reasonable hours during the same.

But it was provided (*k*), that, in all cases in which any body corporate should on the said 5th of June have been bound or engaged by any covenant or agreement, express or implied, or have been enjoined by any deed, will, or other document, or have been sanctioned or warranted by ancient usage, or by custom, or practice, to make any renewal of any lease for years, or for life or lives, or for years determinable with any life or lives, at any fixed or determinate or known or accustomed period, or after the lapse of any number of years, or

on the dropping of any life or lives, and years determinable after the lapse of any number of years (*l*), at a fine certain, or under any special or specific terms or conditions, and also in all cases in which any body corporate should theretofore have ordinarily made renewal of any lease for years, or for life or lives, or for years determinable with any life or lives, at any fixed or determinate or known or accustomed period, or after the lapse of any number of years, or upon the dropping of any life or lives, upon the payment of an arbitrary fine, it should be lawful for the council of such borough to renew such lease for such term or number of years, either absolutely, or determinable with any life or lives, or for such life or lives, and at such rent, and upon the payment of such fine or premium, either certain or arbitrary, and with or without any covenant for the future renewal thereof, as such body corporate could or might have done in case the act had not been passed.

And it was further provided (*m*), that in any of the instances thereafter mentioned it should be lawful for the council from time to time to demise and lease, or to enter into any contract or agreement for demising and leasing, any of the said lands, tenements, or hereditaments, to any person, body politic, corporate, or collegiate, for any term not exceeding seventy-five years from the time of making such lease or agreement; (that is to say,) of tenements or hereditaments the greater part of the yearly value of which should at the time of making the lease or agreement consist of any building or buildings, of land or ground proper for the erection of any houses or other buildings thereupon, with or without gardens, yards, curtilages, or other appurtenances, to be used therewith, and, where the lessee or intended lessee should covenant or agree to erect a building or buildings thereon of greater yearly value than such land or ground, of land or ground proper for gardens, yards, curtilages, or other appurtenances, to be used with any other house or other building erected or to

(*l*) So in the act.

(*m*) Sect. 96.

be erected on any such ground, belonging either to such body corporate, or to any other proprietor, or proper for any other purpose calculated to afford convenience or accommodation to the occupiers of any such house or building.

By section 92, the rents of demised property are made payable to the treasurer of the borough; the *Reddendum* however, should be to the mayor, aldermen, and burgesses, and their successors.

The council first elected were empowered by the 97th section to call in question all leases not made in pursuance of some contract or resolution entered into before the 5th day of June, 1835, and all contracts for the lease of any lands, &c., of which, on or before the said 5th of June, the body corporate, of which they should be the council, whether in their own right, or as trustees for charitable or other purposes, should be seised or possessed, which should have been made between the said 5th day of June and the day of the declaration of their election; and, if ground should appear to the council to exist for believing that any such lease or contract was collusively made for no consideration, or for an inadequate consideration, they were empowered, within six calendar months next after the first election, to cause the value of the premises to be found by a jury in manner in the act mentioned; and the jury were directed to find the value of the premises, and the consideration given, and also that which ought of right to have been given for the lease; and it was declared, that, if the jury should find that no consideration, or an inadequate consideration, had been collusively given, the party to such lease or contract should have his option to re-convey the premises, and abandon the contract, upon receipt of the consideration, if any, which he should have given, or to give such additional consideration, so that the whole consideration given should be that which ought of right to have been given, and that the additional consideration should be indorsed on the original deed; and that, unless he should so do within one calendar month next after the finding of the jury, every such lease and contract should be void as against

the body corporate, and their successors; and that, in every case in which any such contract should have been abandoned, or in which any such lease or contract should become void, the party who would otherwise have had the benefit of the same should be remitted to his former estate, if any, in the premises, as if no such contract or lease had been made. It was provided, however, that it should be lawful for his Majesty, by the advice of his privy council, upon petition to him setting forth the special circumstances under which any lease or contract should have been made since the said 5th day of June, to order that the same should not be called in question under the provisions of the act, and that in such case the same should not be called in question, or set aside, or affected, under the act; provided always that in every case in which such petition should be presented, it should be lawful for his Majesty to enlarge the time within which (in case his Majesty should not think fit to make such order) the council might have power to call in question any lease or contract referred to in such petition.

Where a party whose lease was called in question under this provision omitted for one calendar month to elect whether he would abandon the contract, or pay the additional consideration, it was held, that the lease became absolutely void, and that the remedy of the corporation was at law for recovering possession, and not in equity for a re-conveyance (*n*); and that they could not sustain a bill for the delivering up of the lease to be cancelled, as it was in their power to try its validity at law (*o*). On the other hand, it was determined, that the court had no jurisdiction to order the inquisition finding a lease to be collusive to be given up and quashed, though alleged by the lessee to be irregular, and a fraudulent contrivance of the corporation (*p*).

Where the tenant has elected to pay an increased rent pursuant to the finding of the jury, and such finding is indorsed on the original lease, he will be compelled to produce

(*n*) The Corporation of Arundel *v.*
Holmes, 4 Beav. 325.

(*o*) Ibid.
(*p*) Ibid.

the lease to the corporation, and permit them to take a copy of the indorsement, with a view to their framing a declaration in an action for the increased rent; although the corporation have in their own hands the counterpart of the lease, as well as the inquisition of the jury. The act (said Coleridge, J.,) directs the additional consideration to be indorsed on the original deed; and if the defendant takes upon himself to indorse it, he must be taken to have put it there for the benefit of both parties (*g*).

The 28th section declared, that no person should be qualified to be elected or to be a councillor of any such borough, or an alderman of any such borough, during such time as he should have, directly or indirectly, by himself or his partner, any share or interest in any *contract* or employment with, by, or on behalf of, such council; provided that no person should be disqualified from being a councillor or alderman by reason of his being a proprietor or shareholder of any company which should contract with the council of such borough for lighting, or supplying with water, or insuring against fire, any part of such borough. And it has been held (*r*), that a lease by a corporation of property belonging to the corporation, containing a covenant by the lessee for payment of rent, and keeping the premises in repair, and a power for him to remove any buildings during the term which might be erected by him, and a proviso that the corporation might purchase the buildings at the determination of the term, at a valuation, was such a contract within the act as to disqualify the lessee from being a town-councillor. It was also held (*s*), that the lease, though made by the mayor, aldermen, and burgesses, before the act of 5 & 6 W. 4, was in effect a contract with the council.

Serious inconveniences being apprehended in consequence of this decision, it was soon afterwards enacted (*t*), that, from

(*g*) *The Mayor of Arundel v. Holmes*,

(*s*) *Ibid.*

3 Dowl. Prac. Ca. 113.

(*t*) 5 & 6 Vict. c. 104, sect. 1. Royal

(*r*) *Regina v. York*, 2 Q. B. 347; Assent, 10 Aug. 1842.
S. C. 2 Gale & Dav. 105.

and after the passing of the act, the word *contract* in the prior act should not extend, or be construed to extend, to any lease of any lands, tenements, or hereditaments, or to any agreement for any such lease.

By 6 & 7 W. 4. c. 104, the power of disposition given to the council of any body corporate in the instances of demises for seventy-five years, authorised by the municipal corporations act (*u*), was extended (*v*) to the demise or lease thereof, either at a reserved rent, or a fine, or both, as the council should think fit; and the power of disposition allowed by the same act over the lands, tenements, and hereditaments, of such body corporate, to be exercised with the approbation of the lords commissioners of the treasury, or any three of them, was extended to the disposition of such lands, tenements, and hereditaments, with such approbation, whether by way of absolute sale, or by way of exchange, mortgage, or charge, demise, or lease, and to every other disposition of the same whatsoever, which should be so approved of.

By a previous act (*x*), made for preventing the application of corporate property to the purposes of election of members to serve in parliament, leases of lands, tenements, or hereditaments, belonging to, or vested in, or held in trust for, any municipal corporation, made or executed for the purpose of securing, satisfying, or compensating, any expenses, debts, payments, or disbursements, liabilities, or engagements, incurred or to be incurred, by the same corporation, or any part or class thereof, or any member, officer, or trustee thereof, or by any other person on behalf of such corporation, contrary to the true intent and meaning of the act, are declared (*y*) to be void.

The act of 5 & 6 W. 4. c. 76, effected an alteration in the government of corporations, but in other respects they were not legally changed; and, consequently, though it is common to designate the corporation, in its old state, and in its new

(*u*) Ante, p. 315.

(*v*) 6 & 7 W. 4. c. 104. s. 2.

(*x*) 2 & 3 W. 4. c. 69.

(*y*) Sect. 3.

state, as the old corporation, and the new corporation, yet they are the same corporation, under a new government (z).

Some remarks respecting leases made by municipal corporations of lands held by them in trust for charities will be found in another part of this work (a).

VI.—*Churchwardens and Overseers, and others connected with the Management of the Poor.*

Previously to the passing of the statute of 59 Geo. 3, c. 12 (b), great difficulty was experienced on the subject of leases of parish property; for although, by the special custom of London, the parson and churchwardens of a parish were a corporation to purchase and demise lands (c); yet, in general, neither churchwardens, nor overseers of the poor, distinctly, nor churchwardens and overseers conjointly, in respect of their official capacity, had any legal interest in parish property to demise (d). By that statute, however, churchwardens and overseers were empowered (e), with the consent of the inhabitants of the parish in vestry assembled, to take into their hands any land belonging to the parish, or to the churchwardens and overseers of the poor of the parish, or to the poor thereof, or to purchase, or to hire and take on lease, for and on account of the parish, any suitable portion or portions of land within or near to the parish, not exceeding twenty acres, and to employ the poor in the cultivation thereof on account of the parish.

(z) *The Attorney-General v. Kerr*, 2 Beav. 420, 430. *The Attorney-General v. the Corporation of Newcastle*, 5 Beav. 307.

(a) Post, p. 347; *Leases by Trustees of Charities*.

(b) Entitled "An act to amend the laws for the relief of the poor."

(c) *Warner's case*, Cro. Jac. 532.

(d) Co. Lit. 3, a. *Doe dem. Grundy v. Clarke*, 14 East, 433. *Phillips v. Pearce*, 5 Barn. & Cres. 433; S. C.

8 Dow. & Ry. 43. *Sowden v. Emsley*, 2 Stark. 28. *Doe dem. Higgs v. Terry*, 4 Adol. & Ell. 274; S. C. 5 Nev. & Man. 556; 1 Harr. & Wol. 547. *Doe dem. Hobbs v. Cockell*, 4 Adol. & Ell. 478; S. C., nom. *Doe dem. Higgs v. Cockell*, 6 Nev. & Man. 179. *Doe dem. Norton v. Webster*, 12 Adol. & Ell. 444, n. (a); S. C. 4 Per. & Dav. 270. But see *Dawson v. Fowle*, Hardr. 378-9.

(e) Sect. 12.

And for the purpose of promoting industry amongst the poor, they were also empowered (*f*), with the consent of the inhabitants in vestry assembled, to let any portion and portions of such parish land, or of the land to be so purchased or taken on account of the parish, to any poor and industrious inhabitant of the parish, to be by him or her occupied and cultivated on his or her own account, and for his or her own benefit, at such reasonable rent, and for such term, as should by the inhabitants in vestry be fixed and determined.

And the 17th section provided, that all buildings, lands, and hereditaments, which should be purchased, hired, or taken on lease, by the churchwardens and overseers of the poor of any parish by the authority, and for any of the purposes, of the act, should be conveyed, demised, and assured, to the churchwardens and overseers of the poor of every such parish respectively, and their successors, in trust for the parish; and such churchwardens and overseers of the poor were thereby empowered to accept, take, and hold, in the nature of a body corporate, for and on behalf of the parish, all such buildings, lands, and hereditaments, and also all other buildings, lands, and hereditaments, belonging to such parish.

Before we notice any other statute bearing upon this subject, it will be convenient to dispose of a few decisions on the construction of the act of 59 Geo. 3. c. 12.

It has been determined, that the term "belonging to the parish" must be taken in its popular sense; for in the strict sense lands do not belong to a parish (*g*). And that the 17th section of the act is not confined to tenements the profits of which are applicable merely to the relief of the poor, but extends to tenements the profits of which are applicable to the purpose for which a church-rate is levied (*h*).

(*f*) Sect. 13.

(*g*) Doe dem. *Higgs v. Terry*, 4 Adol. & Ell. 274. 282; S. C. 5 Nev. & Man. 556; 1 Harr. & Wol. 547.

(*h*) Doe dem. *Jackson v. Hiley*, 10 Barn. & Cres. 335; S. C. 5 Man. & Ry. 706. But see *Attorney-General v. Lewin*, 8 Sim. 366; S. C. C. P. Coop. 51.

But how far it operated to withdraw parochial trust property from trustees specially appointed, and to vest it in churchwardens and overseers, is not clearly defined.

In the case of *Doe dem. Jackson v. Hiley* above cited (*i*), it appeared that all the trustees were dead, and that the survivor had devised all his lands, &c. to his half-brother in fee, subject to the payment of his debts; and Lord Tenterden, in delivering the judgment of the court, said, that there was nothing in the act of parliament to prevent property held by trustees for the benefit of a parish vesting in the churchwardens and overseers, and that it would be very inconvenient that it should be so; that it was often difficult for persons who claimed under an ancient trust, where the trustees were numerous, to ascertain who was the survivor of those trustees; and that, even if they succeeded in ascertaining that fact, it would not be less difficult to show who was the heir of that survivor; and that property vested in trustees for the benefit of the parish seemed equally within the mischief contemplated by the legislature, as well as property not so vested. The authority of this case has been recognised by the court of King's Bench (*k*), and by L. C. B. Abinger, who held that estates vested in six feoffees, living and known, in trust for the relief of the poor of the parish of Clifford Chambers, were taken out of them by the statute, and vested in the churchwardens and overseers of the parish (*l*).

But it has since been considered (*m*) that the generality of the language ascribed to Lord Tenterden, which, at first sight, would lead to the conclusion that all tenements in the hands of trustees for parish purposes were by the operation of the act of 59 Geo. 3. transferred to the churchwardens and overseers of the parishes respectively enjoying the benefit of

(*i*) Sup. p. 321.

(*k*) *Doe dem. Higgs v. Terry*, 4 Adol. & Ell. 274; S. C. 5 Nev. & Man. 556. And see *Doe dem. Hobbs v. Cockell*, 4 Adol. & Ell. 478; S. C., nom. *Doe dem. Higgs v. Cockell*, 6 Nev. & Man. 179.

(*l*) Ex parte *Annesley*; *Mre The Stratford Bridge Improvement Act*, 2 Yo. & Col. 350.

(*m*) *Allason, or Allison, v. Stark*, 9 Adol. & Ell. 255; S. C. 1 Per. & Dav. 183; 3 Law Jour. N. S. M. C. 13; 1 Wil. Wol. & Hodg. 719.

the trust, is to be received with some qualification, and construed with reference to the particular circumstances of the case connected with it. According to Lord Denman, C. J. (*n*), the case of *Doe v. Hiley* was satisfactorily explained by the fact that no feoffee appeared, nor any other person in whom the legal estate was vested. He, therefore, considered the very mischief which the act was intended to remedy had occurred, and that Lord Tenterden's expressions referred to that case only; and with this explanation he thought the case perfectly satisfactory. Patteson, J., however, while he agreed that the right conclusion had been drawn from that case, wished for himself to abstain from laying down that the act in question took parish lands out of trustees, and vested them in churchwardens (*o*); a proposition, he said, that *Doe v. Hiley* went very nearly to establish, though he did not think that it did quite (*p*).

In a later case in the Exchequer (*q*), however, the doctrine implied in the general remarks used in *Doe v. Hiley* was adopted to its fullest extent. A certain messuage and premises had been demised in 1782 to seven persons, for a term of years, with a view to their being converted into a poor-house, which was to be held in trust for the inhabitants at large of the parish; and the question was, whether the property had been transferred to the churchwardens and overseers of the parish by the operation of the act. The court said:—"We do not consider it as being *res integra*, inasmuch as it has been decided by the court of Queen's Bench that the statute does apply in all cases; and as the agreement here is a grant of property to be used as a poor-house, we think it is within the provisions of the statute, and, accordingly, that the property is vested in the overseers (*r*) for the time being." It is observable that *Allason v. Stark* was not referred to.

(*n*) *Allason, or Allison, v. Stark*, sup.

(*o*) Qy. churchwardens and overseers?

(*p*) 1 Per. & Dav. 193.

(*q*) *Alderman v. Neate*, 4 Mees. & Wel. 704; S. C. Horn & Hurl. 369.

(*r*) Qy. churchwardens and overseers?

The point was again agitated, but not decided, in the matter of the Retford church and poor lands (*s*).

It is certainly one of importance to parties who have taken leases from the trustees of parish property, and require the legal estate of the premises demised.

But even supposing the cases to have determined the proposition, that the act would in all cases transfer lands held for parochial purposes from the trustees to the churchwardens and overseers, it is clear that such transfer would not be extended to property not strictly and exclusively applicable to such purposes (*t*). And, therefore, in a case before noticed (*u*), where the trusts were for the reparation of the church of Wickham Market, and the relief of the poor of that parish, either in the workhouse or otherwise; for binding one poor boy apprentice in each year from the parish; and for instructing the poor of the parish; the Vice Chancellor (Shadwell) declared, that the estates held subject to the trusts were not vested in the churchwardens and overseers of the poor by the operation of the act.

So, where lands were vested in certain persons, upon trust, as to one moiety thereof, for and towards the better relief of the most poor and needy people that should be of good life and conversation in the parish, and, as to the other moiety, for putting out poor boys apprentices; the court were unanimously of opinion, that the legal estate in the land was not transferred to the churchwardens and overseers of the parish by the act (*x*); Lord Denman observing, that he could not believe that the intention of the act was to divest parties of special trusts which had been conferred upon them, (which construction would apply to any subsequent devise to trustees,) and to transfer them to the churchwardens and overseers merely for some small benefit to the parish.

(*s*) In the matter of the West Retford church and poor lands, 10 Sim. 101; S. C. Ex parte Lee, 3 Jurist, 501.

(*t*) Attorney-General v. Lewin, sup.

Re Paddington Charities, 8 Sim. 629. Allason, or Allison, v. Stark, sup.

(*u*) Attorney-General v. Lewin, sup.

(*x*) Allason, or Allison, v. Stark, sup.

It is clear that the statute does not affect copyholds (*y*).

In an action by churchwardens and overseers for the use and occupation of lands held by them in the nature of a body corporate under the act, the declaration must describe them as churchwardens and overseers (*z*).

We may now resume our notice of the statutes connected with the subject of this chapter.

By 1 & 2 W. 4. c. 42 (*a*), the twenty acres allowed by 59 Geo. 3. c. 12, to be taken by churchwardens and overseers were afterwards extended to fifty (*b*).

And by that act (*c*), churchwardens and overseers were empowered to inclose from any waste or common land lying in or near to the parish, with the consent in writing of the lord of the manor, and the major part in value of the persons having right of common thereon, signified under their hands and seals, any part or portion of such waste or common land not exceeding fifty acres, and to cultivate and improve the same for the use and benefit of such parish, and the poor persons within the same, or to let any part or parts of the same to any poor and industrious inhabitant or inhabitants of such parish, to be by him or them occupied and cultivated on his or their own account.

And the same act provided (*d*), that the powers and authorities thereby given to churchwardens and overseers of the poor should extend to, and might be exercised by, the guardians of the poor of any parishes or places which were or might be incorporated or united under the act of 22 Geo. 3. c. 83 (*e*),

(*y*) Attorney-General *v.* Lewin, sup.
Re Paddington Charities, sup.

(*z*) Ward *v.* Clarke, 12 Mees. & Wel.
747; S. C. 1 Dowl. & Lown. 1027.

(*a*) 1 & 2 W. 4. c. 42, entitled "An act to amend an act of the 59th year of His Majesty King George the 3rd for the relief and employment of the poor."

(*b*) Sect. 1. The like power was given by 1 & 2 W. 4. c. 59, to churchwardens and overseers to inclose from any forest or waste lands belonging to the crown lying in or near the parish,

with the consent of the lord high treasurer, or the commissioners of the treasury, not exceeding fifty acres. This was entitled "An act to enable churchwardens and overseers to inclose land belonging to the crown, for the benefit of poor persons residing in the parish in which such crown land is situated."

(*c*) Sect. 2.

(*d*) Sect. 3.

(*e*) Entitled "An act for the better relief and employment of the poor."

or under any local act, and by the overseers of all townships, villages, and places, having separate overseers, and maintaining their poor separately. And also (*f*), that the provisions of 59 Geo. 3. c. 12, with respect to the providing of land for the employment of the poor, or to the cultivation, management, or disposition thereof, or to the poor persons employed thereon, or renting any portion thereof, should, so far as the same were applicable, extend to any land which should be provided under the act of 1 & 2 W. 4. c. 42, and to the poor persons employed thereon, or renting any portion thereof respectively.

Provision for letting to industrious cottagers, in small portions, the poor allotments, in parishes inclosed under any act of parliament, was made by another statute of Wm. the 4th (*g*), whereby (*h*), after reciting that in parishes inclosed under acts of parliament there were in many cases allotments made for the benefit of the poor, chiefly with a view to fuel, which were then comparatively useless and unproductive, and that it would tend much to the welfare and happiness of the poor if those allotments could be let at a fair rent, and in small portions, to industrious cottagers of good character, while the distribution of fuel might be augmented by appropriating the rents to the purchase of an additional quantity, it was enacted, that it should be lawful for the trustees of the allotments, together with the churchwardens and overseers of the poor, in parish vestry assembled, to let portions of any such allotment, not less than one-fourth of a statute acre, and not exceeding one such acre to any one individual, according to their discretion, as a yearly occupation from Michaelmas to Michaelmas, (and at such rent as land of the same quality was usually let for in the parish,) to such industrious cottagers of good character, being day-labourers or journeymen legally settled in the parish, and dwelling within or near its bounds, as should apply for the same in the manner therein-

(*f*) Sect. 4.

(*g*) 2 W. 4. c. 42, entitled "An act to authorise (in parishes inclosed under any act of parliament) the letting of

the poor allotments in small portions to industrious cottagers."

(*h*) Sect. 1.

after mentioned: Provided (*i*) that the person hiring the same should be held bound to cultivate it in such a manner as should preserve the land in a due state of fertility. And (*k*) that the rent should be reserved and payable to the churchwardens and overseers of the poor, on behalf of the vestry, in one gross sum for the whole year, and should be paid to one or either of them at the end of the year's occupation.

It was further enacted (*l*), that the rent of the said portions of land should be applied by the vestry in the purchase of fuel, to be distributed in the winter season among the poor parishioners legally settled and resident in or near the parish.

And further (*m*), that if any of the allotments should be found to be at an inconvenient distance from the residences of the cottagers, it should be lawful for the vestry, by an order made to that effect, to let such allotment, or any part thereof, for the best rent that could be procured for the same, and to hire, in lieu thereof, for the purposes of the act, land of equal value more favourably situated.

But (*n*) that no habitations should be erected on the portions of land demised under the act, either at the expense of the parish, or by the individuals renting the same.

And after noticing that, by the acts of 1 & 2 W. 4. c. 42, and 1 & 2 W. 4. c. 59, power was given, under certain restrictions, to inclose any quantity, not exceeding fifty acres, of waste land and crown land respectively, for the use and benefit of the poor, it was further enacted (*o*), that in any parish where such inclosure should exist, or should thereafter take place, or where the land should in any other manner be found appropriated for the general benefit of the poor of any parish, then the powers and provisions of the act (2 W. 4. c. 42,) should be held to apply, in so far as the same might be found applicable.

Next came the act known as the new poor law act (*p*),

(*i*) Sect. 2.

(*k*) Sect. 2.

(*l*) Sect. 4.

(*m*) Sect. 9.

(*n*) Sect. 10.

(*o*) Sect. 11.

(*p*) 4 & 5 W. 4. c. 76, entitled "An act for the amendment and better ad-

whereby the administration of relief to the poor throughout England and Wales according to the then existing laws, or such laws as should be in force at the time being, was subjected to the direction and control of the poor law commissioners for England and Wales; and it was declared (*g*), that, except where otherwise thereby provided, all the powers and authorities given by the act of 59 Geo. 3. c. 12, should in future be exercised by the persons authorised by law to exercise the same, under the control and subject to the rules, orders, and regulations, of the commissioners.

In order to insure the due application of the property of parishes and unions, an act of 5 & 6 W. 4 (*r*) provided (*s*), that it should be lawful for the guardians (*t*) of any parish or union (*u*), and for the overseers of any parish not under the management of a board of guardians, and for the guardians or trustees of any dissolved union, or the person or persons who were the guardians or trustees of any dissolved union at the time of its dissolution, or a majority of such guardians, trustees, or persons, if more than one, with the approbation, and subject to the rules, orders, and regulations, of the poor law commissioners, to sell, exchange, *let*, or otherwise to dispose of any workhouses, tenements, buildings, land, effects, or other property, belonging to any such parish or union, or vested in trustees or feoffees in trust for such parish or union, or for the parishioners, rate-payers, or inhabitants thereof, or which then belonged, or then formerly did belong,

ministration of the laws relating to the poor in England and Wales." See ss. 1, 2, & 15; and also s. 49.

(*g*) Sect. 21.

(*r*) 5 & 6 W. 4. c. 69, entitled "An act to facilitate the conveyance of workhouses and other property of parishes and of incorporations or unions of parishes in England and Wales." And see 1 Viet. c. 50.

(*s*) Sect. 3.

(*t*) The word "guardians" is interpreted to signify any visitor, governor, director, manager, acting guardian,

vestryman, or other officer, in a parish or union, appointed or entitled to act as manager of the poor, and in the distribution or ordering of the relief to the poor from the poor-rate, under any general or local act of parliament.

(*u*) The word "union" is to include any number of parishes united for any purpose whatever under the provisions of the act of 4 & 5 W. 4. c. 76, or incorporated under the act of 22 Geo. 3. c. 33, or incorporated for the relief or maintenance of the poor under any local act.

to any dissolved union: Provided that no such sale, or exchange, or letting, should take place except with the consent of a majority of the rate-payers of such parish, and of the owners of property therein, entitled to vote under and by virtue of the act of 4 & 5 W. 4. c. 76: And provided that every sale and exchange or lease of any such workhouse, tenements, buildings, land, or other property, which might have been made before the passing of the act (5 & 6 W. 4. c. 69), with the consent in writing of the poor law commissioners, should be as valid as if the same had been directed by their order under the authority thereof; and that any moneys or rents which had become or should become payable in respect of any such sale, exchange, or lease, and had not been applied, should be applied in the same manner as such moneys or rents would have been applicable if such sale, or exchange, or lease, had been made thereunder (*x*).

It was further provided (*y*), that all powers and authorities by the act of 59 Geo. 3. c. 12, given to churchwardens and overseers of the poor for taking land or ground into their hands, and for purchasing, hiring, and taking on lease, any land; and all the powers and authorities contained in the acts of 1 & 2 W. 4. c. 42; 1 & 2 W. 4. c. 59; and 2 W. 4. c. 42, should in future be exercised (under the control, and subject to the rules, orders, and regulations, of the poor law commissioners,) by the overseers of the poor in any parish not under the management of a board of guardians, and by the guardians of the poor of any union or parish formed or established by virtue of any statute or local act.

And, for simplifying the instruments of assurance of property under the act, the 6th section provided, that every conveyance under the authority of the act might be made according to the form set forth in the schedule thereto annexed (*z*), or in such other forms as the poor law commissioners should direct,

(*x*) The Act does not appear to contain any provision for the application of the rents of the property let.

(*y*) Sect. 4.

(*z*) The form will be found in the Appendix to this work, though it appears rather adapted to an absolute conveyance than to a lease.

or as near thereto as the number of parties, the nature of the interests, and the circumstances of the case, would admit; and should, when executed by the conveying parties, be valid and effectual in the law, without livery of seisin being made, or any bargain and sale to vest possession being executed; and that every conveyance or instrument made under the authority of the act, should, when signed by the conveying parties thereto, be transmitted to the poor law commissioners, who should, if they should approve thereof, signify such approval by sealing or stamping the same with their seal. And, for preserving evidence of such instruments, the commissioners were ordered to keep a register, properly indexed, in which they should insert copies or memorials of such deeds or instruments of which they should so approve, and of such orders of appropriation of property as were thereinbefore mentioned; and it was provided that all such copies or memorials, or copies thereof, purporting to be sealed or stamped with the seal of the commissioners, should be received as evidence of the instruments respectively of which they should purport to be copies or memorials (*a*).

It was further provided (*b*), that the guardians of the poor of every union then already formed, or which thereafter should be formed, by virtue of the act of 4 & 5 W. 4. c. 76, and of every parish placed under the control of a board of guardians by virtue of the same act, should respectively from the day of their first meeting as a board become, or be deemed to have become, and they and their successors in office should for ever continue to be, for all the purposes of the act, [5 & 6 W. 4. c. 69,] a corporation, by the name of the guardians of the poor of the — union (or of the parish of —) in the city of —; and, as such corporation, the said guardians were thereby empowered to accept, take, and hold, for the benefit of such union or parish, any buildings, lands, or hereditaments, goods, effects, or other property, and to use a common seal.

(*a*) And see 8 & 9 Viet. c. 112, as to the admission in evidence of certain

official and other documents.

(*b*) Sect. 7.

It has lately been determined (*c*), that the language of this act of 5 & 6 W. 4. c. 69, is not sufficient to divest parish property out of the parish officers. The statute confers upon the guardians very extensive powers over it; but they are consistent with the continuance of the legal estate in other persons; and should the guardians experience any obstruction from the overseers in the exercise of their powers, they may resort to a court of equity, or other proceedings, for the purpose of compelling submission (*d*).

Doubts having arisen as to the meaning and extent of the provisions of the third section of 5 & 6 W. 4. c. 69 (*e*), it was declared by a recent act (*f*), that they shall be deemed to have authorised, and to authorise, the sale, exchange, letting, and disposal, by the guardians of a union formed, or to be formed, by the commissioners, of any workhouse, tenements, buildings, land, effects, or other property, belonging to any parish which shall be comprised in the said union; and, in cases of the sale, exchange, letting, and disposal of workhouses, tenements, buildings, land, effects, and other property, belonging to a dissolved union, to have applied and to apply to a majority of the persons who were the last acting guardians previous to the dissolution of such union: provided that nothing therein contained shall be deemed to render valid, or to authorise, the sale, exchange, letting, or other disposition, of any property which shall have been given or bequeathed by way of charitable donation, or shall have been allotted in right of some charitable donation, or otherwise, for the poor persons of any parish, and not for the general benefit of the rate-payers, parishioners, or inhabitants of such parish; nor to dispense with the consent of the rate-payers and owners of property required by 5 & 6 W. 4. c. 69, to all sales, exchanges, lettings or other dispositions, of property belonging to any parish, except in the case next thereafter provided.

(*c*) Doe dem. Norton v. Webster,
12 Adol. & Ell. 442; S. C. 4 Per. &
Dav. 270.

(*d*) Per Patteson, J., Ibid.

(*e*) Ante, p. 328.

(*f*) 5 Vict. sess. 2, c. 18. s. 2.

The act then provides (*g*), that, where several parishes shall have been, or shall be, jointly interested in any workhouse, tenements, buildings, lands, whether of freehold, copyhold, or customary tenure, effects, or other property, it shall be deemed to have been, and shall be, lawful for the commissioners, upon the application of the overseers of the major part of such parishes, and with the consent of the rate-payers and owners of property in the major part of such parishes, to be ascertained in the manner directed by the said act of 5 & 6 W. 4. c. 69, to order the same to be sold, let, exchanged, or disposed of, by the guardians of the union in which such parishes or the greater part thereof shall be situate, in such manner, and subject to such rules, orders, and regulations, as the commissioners shall deem fit; and that it shall be deemed to have been, and to be, lawful for the commissioners to direct the application of the produce arising from such sale, letting, or disposition, in the same manner, and for the same purposes, as the produce arising from the sales of property belonging to other parishes might be applied to: provided that where any conveyance by way of sale, lease, exchange, disposition, or otherwise, of any property belonging to a parish or union, whether dissolved or not, shall have been, or shall thereafter be, made by the guardians of any existing union, or a majority of the last acting guardians of any dissolved union, under the order of the commissioners, the same shall be deemed to have been and to be valid for all the purposes of such conveyance, although the legal estate in such property shall be, or shall be presumed to be, outstanding in some trustee or trustees who shall not have joined in such conveyance.

VII.—*Queen Consort.*

The common law power of the Queen Consort to dispose of her property, real or personal, as if she were a feme sole (*h*),

(*g*) Sect. 3.

(*h*) Co. Lit. 3, a. 133, a.

has been fully recognised and confirmed by the legislature (*i*) ; for we find it enacted (*k*), that it shall be lawful for the Queen Consort, for the time being, at any time during the joint lives of herself and the King, by deed under hand and seal, to be executed in the presence of and attested by two or more witnesses, to grant, give, alien, dispose of, and convey, any manors, messuages, &c., purchased by, or in trust for, her Majesty, or which may come, or devolve upon, or vest in her, or any person or persons in trust for her, for any estate of inheritance or freehold, or for any copyhold or customary estate, under or by virtue of any deed, gift, will, or otherwise, for all or any part of such estate, right, and interest, in all respects as if she were sole and unmarried. But it is provided (*l*), that the act shall not extend to enable her to make any grant, conveyance, or disposition, of any palace, or capital mansion-house, gardens, lands, or hereditaments, belonging to the King, or any of his successors, in right of the crown, vested in her for life, for her jointure or otherwise, under any letters patent of his Majesty, or any of his successors, or by act of parliament, or to make any grant, conveyance, or disposition, which she could not make if sole and unmarried.

VIII.—*Duke of Cornwall.*

The title of Duke of Cornwall belongs of right, as we have seen (*m*), to the King's or Queen's eldest son, in whom also the fee-simple of the possessions annexed to the duchy is vested (*n*), though he cannot sever them by alienation from the dignity, to the prejudice of the successor (*o*). At common law, he may grant leases for a term coextensive with the period of his own personal enjoyment of the title and estates, but, on his death (*p*), or accession to the throne (*q*), the lessee

(*i*) 39 & 40 Geo. 3. c. 38. s. 8.

(*k*) Sect. 9.

(*l*) Same section.

(*m*) Ante, p. 217.

(*n*) Com. Dig. Roy, (G. a.)

(*o*) The Prince's case, 8 Co. 14, b. et passim.

(*p*) 21 Jac. 1. c. 29. s. 1. 10 Geo. 2. c. 29. s. 9.

(*q*) 1 Car. 1. c. 2. s. 1.

must yield to the claim of the next succeeding heir. Parliament only can remedy the inconvenience; and, accordingly, we find that acts (*r*) have been passed in various reigns to enable the Dukes of Cornwall for the time being to confer indefeasible estates by way of demise. The act (*s*) which gives this power to Albert Edward, Prince of Wales, the present Duke of Cornwall, was passed a few months after the birth of his royal highness. It begins by reciting that his royal highness stood seised of the duchy of Cornwall and the possessions thereof of an estate of inheritance under a special form of limitation differing from the ordinary rules of inheritance at common law, whereupon doubts had arisen whether leases and grants made by his royal highness of any of the possessions of his duchy would be good and effectual in law longer than for the life of his royal highness, and then for avoiding of which doubts, and for the ease and quiet of the minds of such persons as had taken, or should thereafter take, leases or grants from his royal highness, and to the end that such persons might be sure to have good and indefeasible estates, and be encouraged to lay out moneys in building and repairing or otherwise improving the several lands and tenements to them demised or granted, or to be demised or granted, and to take sets or leases of the mines and minerals parcel of the said possessions, it enacts, that all leases or grants made, or to be made, by his royal highness, by letters patent or indentures under the great or privy seal of his royal highness, or by copy of court roll, of any manors, messuages, parks, lands, tithes, tenements, or hereditaments, parcel of the possessions of the duchy of Cornwall, or annexed to the same, shall be good and effectual in law, according to the purport and contents of the said leases or grants, against her Majesty, her heirs and successors, and against the heirs and successors of his royal highness, dukes of Cornwall, and against all and every person or persons who shall or may inherit or succeed to the said duchy according to the said limitation or other-

(*r*) 21 Jac. 1. c. 29. 10 Geo. 2. 50 Geo. 3. c. 6. 1 Ves. 295.
c. 29. ss. 9, 10, & 11. 33 Geo. 3. c. 78. (*s*) 5 Viet. sess. 2. c. 2.

wise (*t*): Provided always, that every such lease or grant so made, or to be made, in possession, shall be made for three lives or fewer, or for thirty-one years or under, or for some term of years determinable upon one, two, or three lives, and not above; and if such lease or grant be made in reversion or expectancy, that then the same together with the estates in possession do not exceed three lives, or the term of thirty-one years, and be not in anywise dispunishable of waste; and so as upon every such lease or grant there be or shall be reserved the ancient or most usual rent, or more, or such rent as hath been reserved, yielded, or paid, for such of the premises as are or shall be contained therein for the greater part of twenty years next before the making of the said lease or grant; such rent to be reserved due and payable to such as have the inheritance or other estate of and in the said duchy; and, where no such rent hath been reserved or payable, that then upon every such lease or grant there be or shall be reserved a reasonable rent, not being under the twentieth part of the clear yearly value of the manors, &c. contained in such lease or grant; and where the subject-matter of such lease or grant shall be mines, minerals, or toll dues, or royalties in respect of mines or minerals, that then upon every such lease or grant there be or shall be reserved a reasonable rent, payment, toll, due, dole, or dish, without taking or requiring any fine or fines whatsoever (*u*).

The third section, after noticing that certain parts of the possessions of the duchy are capable of improvement by the erection of substantial buildings thereon, and by the cultivation of waste lands, which cannot be undertaken by the lessees unless they are secured by a longer interest in the premises than thirty-one years, or a term of years determinable upon three lives, enacts, that it shall be lawful for his royal highness to make leases and grants, by letters patent or indentures under the great or privy seal of his royal highness, of any lands, tenements, or hereditaments, parcel of the pos-

(*t*) Sect. 1.

(*u*) Sect. 2.

sessions of the duchy, or annexed to the same, for any term of years not exceeding the term of ninety-nine years, expressly for the purpose of improving the same by erecting substantial buildings thereon, or for the purpose of improving waste lands by cultivation or otherwise: provided always, that, upon all such last-mentioned leases or grants so to be made, improved annual ground-rents be reserved and made payable as therein aforesaid, during the terms therein limited, and that no fines or other considerations be taken by his royal highness further or other than the improved annual ground-rents by the act directed to be reserved.

It is also enacted (*x*), that all covenants, conditions, reservations, and agreements, contained in every such lease or grant made or to be made shall be good and effectual in law, according to the words and contents of the same, as well for and against them to whom the reversion of the said manors, &c. shall come, as for and against them to whom the interest of such leases or grants shall come respectively, as if his royal highness at the time of making such covenants, conditions, reservations, and agreements, had been or were seised of an absolute estate in fee-simple in the same manors, &c.

The 5th section contains a saving to all persons, bodies politic and corporate, their heirs and successors, executors, administrators, and assigns, other than his royal highness, his heirs, and successors, dukes of Cornwall, and other than her Majesty, her heirs and successors, and all persons, and the lessees of such persons, that shall hereafter inherit and enjoy the said duchy by force of any act of parliament, or other limitation whatsoever, of all such rights, titles, estates, customs, interests, tenures, terms, claims, and demands whatsoever, of what nature, kind, or quality soever, of, in, or out of, the said manors, &c., as they or any of them had or ought to have had before the making of the act, and in as ample a manner as if the act had never been made.

The 6th section recites that doubts might exist respecting

the extent of the power and authority of her most excellent Majesty, as guardian of his royal highness, during the minority of his royal highness, and that it was expedient that such doubts should be removed, and then enacts, that it shall be lawful for her Majesty, during such minority, to exercise, in the name and on the behalf of his royal highness, all the rights, powers, privileges, and authorities, which appertain to, or might be exercised by, his royal highness in respect of his said duchy of Cornwall, if of full age; and that all acts, matters, and things, done or to be done during such minority, in the name and on the behalf of his royal highness, by her Majesty as such guardian, or by any other persons acting under the authority of her Majesty, in pursuance of, and in conformity with, the powers and authorities to them in that behalf committed by her Majesty, shall be valid in law, as if the same had been and were done, and that the same shall to all intents and purposes be deemed and taken to have been and to be done, by his royal highness himself in his own proper person, and at his full and perfect age: Provided always, that all leases and grants of any of the possessions of the said duchy to be made during the minority of his royal highness shall be subject to the provision of this act: And provided also, that all offices, appointments, and employments, belonging to his royal highness in right of his said duchy, given or bestowed during such minority, which may by law be given or bestowed during pleasure, shall be determinable by his royal highness at any time after he shall attain the age of twenty-one years.

Further powers have lately been conferred by parliament (*y*) on his royal highness and his council touching the possessions of the duchy of Cornwall.

By the act referred to, the council of his royal highness are empowered (*z*), at any time during his minority, to purchase or take in exchange from any person whomsoever any lease, term of years, or chattel interest, which may for

(*y*) 7 & 8 Vict. c. 65.

(*z*) Sect. 10.

the time being be subsisting of or in any manors, messuages, lands, tenements, or hereditaments, part of the lands or possessions of the duchy, and to enter into such contracts or agreements for that purpose as to the council shall seem proper.

And (a) in every case in which any subsisting lease, term of years, or chattel interest, of or in any part of the said lands and possessions of the duchy shall be purchased or taken in exchange by the council, the council is empowered either to cause the same to be surrendered to his royal highness or otherwise, in order that the same may merge in the reversion expectant thereon, or to cause the same to be assigned to any person as a trustee for his royal highness, his heirs and successors, in order that the same may be kept on foot distinct from the inheritance.

His royal highness, his heirs or successors, are also enabled (b) to grant to any copyhold or customary tenant of any messuages, lands, or tenements, holden of any manor parcel of the possessions of the duchy, a license authorising such tenant to demise all or any part of the same tenement for any term or number of years not exceeding twenty-one years, or, for building, rebuilding, or repairing purposes, for any term of years not exceeding ninety-nine years, to commence from the time of granting such license, or for any one or more of the purposes aforesaid; but in every such license shall be expressed and fixed the sum which during the term to be mentioned in such license shall be considered as the annual value for assessing the fines payable to his royal highness, his heirs and successors, upon the admission of any new tenant to any tenement which shall have been built on or improved, or for the building on and improving of which such license shall be granted, so that the sum to be fixed shall not in any case be less than the best annual rent which might at the date of such license be reasonably obtained on a demise of the premises therein mentioned for a term of ninety-nine years, or

for such shorter term as shall be expressed in any such license, without taking any fine, premium, or foregift, for the making of such demise; and so that the sum so to be fixed shall not be considered as the annual value according to which the fine is to be assessed for any greater number of years than the term of ninety-nine years, to commence from the date of such license, or such shorter term as in the said license shall be expressed; and so that no fine, premium, or foregift, shall be taken for the making or granting of such license, save and except the customary annual fine (if any) for every year of the said term to be expressed in such license, and such fees as shall be usual or reasonable in that behalf; and so that upon the grant of every such license there be saved and reserved to his royal highness, his heirs and successors, all fines, heriots, rents, customs, and services, due and to grow due in respect of the tenements in respect of which such license shall be granted: provided, that every such license shall be entered on the court rolls or court books of the manor of which the tenement in respect of which such license shall be granted is holden.

Every deed or instrument whereby any manors, messuages, &c., parcel of the duchy lands shall be leased or licensed to be demised, under the authority of the act under notice, or of any other act, or otherwise, is within six calendar months after the date of such deed or instrument to be enrolled in the office of the duchy of Cornwall (c).

But the council of his royal highness, or others the commissioners for managing the affairs of the duchy for the time being, for every reasonable cause to them shown for the omission or delay, may permit the making of any such enrolment or entry *nunc pro tunc* (d).

After noticing that in leases theretofore granted and then subsisting of parts of the lands and possessions of the duchy there are contained covenants or agreements entered into by the respective lessees with certain officers of the duchy, and

(c) Sect. 30.

(d) Sect. 35.

conditions to be taken advantage of or enforced by certain officers of the duchy, and that in the same leases, or in other leases theretofore granted and then subsisting of parts of the lands and possessions of the duchy, there are contained covenants, agreements, or conditions, as to acts or things on the part of the lessees, their executors, administrators, or assigns, to be observed, done, or performed before, with the consent or under the direction of certain officers of the duchy; and that by certain acts of parliament and otherwise various duties and powers are imposed upon and given to certain officers of the duchy; and that changes had taken place, and might thereafter take place, in the persons of such officers, or in the titles and duties of their offices, and that it was expedient that provision should be made in respect thereof; the act empowered (*e*) his royal highness, his heirs or successors, from time to time to appoint any officer of the duchy, or other person, by whom and in whose name any covenants or agreements entered into by any lessee with any other officer of the duchy may be sued upon and enforced, and by whom and in whose name any conditions which might be taken advantage of and enforced by any other officer of the duchy may be taken advantage of and enforced; and declared, that every such covenant, agreement, and condition, shall and may be sued upon, taken advantage of, and enforced, by and in the name of the officer or other person for that purpose so appointed, as fully, and in the same manner, as the same might have been sued upon, or taken advantage of, and enforced, by and in the name of the officer with whom such covenants or agreements were entered into, or by whom such conditions were to be taken advantage of or enforced; and that any such appointment may be made either for any one case, or for any class of cases, or for all cases generally.

The act further empowered (*f*) his royal highness, his heirs or successors, from time to time to appoint any officer of the duchy or other person before or with the consent or under

(*e*) Sect. 37.

(*f*) Sect. 33.

the direction of whom all acts or things on the part of any lessees, their executors, administrators, or assigns, to be observed, done, or performed, before or with the consent or under the direction of any officer of the duchy, may be observed, done, or performed, instead of before or with the consent or under the direction of the officer named or described in such leases; and declared, that in every case in which in any lease theretofore granted and then subsisting of any part of the lands or possessions of the duchy there are contained any covenants, agreements, or conditions, as to any acts or things on the part of the respective lessees, their executors, administrators, or assigns, to be observed, done, or performed, before or with the consent or under the direction of any officer of the duchy therein named or described, all and every such acts and things shall and may be lawfully and effectually observed, done, or performed, before, with the consent, or under the direction, of any such other officer of the duchy, or other person for the time being so appointed or authorised in that behalf; and that every lessee and other person who, under any covenant, agreement, or condition, in any such lease contained, then was or thereafter should be bound or liable to observe, do, or perform, any such act or thing, before or with the consent or under the direction of such other officer of the duchy in the said lease named or described, should at all times thereafter be bound and liable to observe, do, or perform, every such act or thing before or with the consent or under the direction of such other officer of the duchy, or other person for the time being so appointed or authorised in that behalf; and that in case of any such lessee or other person refusing, omitting, or neglecting, to observe, do, or perform, any such act or thing before or with the consent or under the direction of such officer of the duchy, or other person for the time being to be so appointed or authorised, then his royal highness, his heirs and successors, are to have the same rights of entry, action, and suit, and other rights and remedies, against the lessee or other person so refusing, omitting, or neglecting, and upon the

demised premises, as his royal highness, his heirs or successors, would or might have had if such lessee or other person had refused, neglected, or omitted, to observe, do, or perform, the same act or thing before the officer of the duchy in the lease named or described in that behalf; and every such appointment may be made either for any one case, or for any class of cases, or for all cases generally.

Another section (*g*) enables her Majesty, or any persons acting under her authority, during the minority of his royal highness, to exercise, in his name and on his behalf, all the rights and powers given to or which might be exercised by his royal highness by virtue of the act; and declares, that all acts, matters, and things, which shall be done during such minority, by virtue of the act, in the name and on the behalf of his royal highness, by her Majesty, or any persons acting under her authority, in pursuance of the powers to them in that behalf committed by her Majesty, shall be as effectual in law as if the same had been done by his royal highness in his own person, and at his full and perfect age.

It is further provided (*h*), that, where by the act any contracts, assurances, matters, or things, are directed to be entered into, made, or done, by the council of his royal highness, (except in cases which are therein otherwise specially provided for,) it shall be lawful and sufficient for such contracts, assurances, matters, and things, to be entered into, made, or done, by any three or more of the members of the council for the time being; and that all contracts and assurances purporting to be signed by any three or more members of the council shall be received in evidence without any further proof thereof.

And further (*i*), that no license, grant, or lease, to search for or work or get mines, minerals, stone, or substrata, belonging to the duchy, for a period not exceeding one year from the date of such license, grant, or lease, shall be subject to any stamp duty whatsoever.

IX.—*Master of the Rolls.*

The Master of the Rolls for the time being and his successors, masters of the rolls, were empowered by an act passed in the reign of King Charles the 2nd (*k*) to make leases for one-and-forty years, or for any lesser term, of the rolls estate, or any part thereof, (the chapel of the rolls, with a convenient mansion-house, court-yard, garden, stable, coach-house, and other outhouses, and buildings, fit for the use and habitation of the master of the rolls, only excepted): and the act (among other clauses) contained a provision that the master of the rolls for the time being, or any succeeding master of the rolls, after the premises had been once letten according to the power, should not grant or make any new or concurrent lease until within seven years of the expiration of the lease then in being; nor for any less rent than was reserved upon the former lease; nor for any longer term than for the term of one-and-twenty years from the making of such lease (*l*).

This statute was afterwards repealed by an act of the reign of George the 3rd (*m*), which, among other provisions relative to the leasing of the rolls estates, enacted (*n*) that it should be lawful for the master of the rolls for the time being to make any lease of the rolls estates, (the chapel of the rolls, and the mansion-house, court-yard, gardens, stables, coach-houses, and other outhouses, and buildings, then used for the habitation and accommodation of the master of the rolls, only excepted,) for any term or number of years not exceeding twenty-one years in possession, from the making thereof, or from the quarter-day next preceding the date and making of such lease, at the best and most improved rent, without taking foregift or gratuity; such rent to be thereby reserved and made payable to the master of the rolls making such

(*k*) 12 Car. 2. c. 36; Confirmed by S. C. 1 W. Blac. 617.
13 Car. 2. stat. 1. c. 14.

(*m*) 17 Geo. 3. c. 59. s. 2.

(*l*) See, as to the construction of this act, *Wilson v. Sewell*, 4 Burr. 1795;

(*n*) Sect. 10.

leases respectively, and his successors, during the term or terms not exceeding the said term of twenty-one years; and the lessees in such leases respectively executing counterparts thereof, and thereby covenanting to pay such rents accordingly, and thereby also covenanting to keep the premises thereby demised in good and tenantable repair during the term, and to leave the same in such good and tenantable repair, at the end or other sooner determination of the term.

And the 11th section provided, that no lease of the said premises thereafter to be made by any master of the rolls, otherwise than according to the power thereby given, should be binding on his successors.

A later act (*o*) empowered the master of the rolls, with the consent and approbation of any three of the lords commissioners of his Majesty's treasury for the time being, testified by their being parties to such lease, to grant to the society of judges and serjeants at law, at a peppercorn rent, a lease, for a term not exceeding ninety-nine years, of such part of the rolls estate as might be necessary for the erection of commodious chambers for the use of the judges for judicial purposes, together with convenient avenues and approaches to the same from Serjeants'-inn; such lease nevertheless to contain such covenants, provisoes, and restrictions, as three of the said lords commissioners of his Majesty's treasury for the time being should order and direct. In pursuance of which, a lease has been granted of part of the garden belonging to the mansion-house to the society of judges and serjeants at law for a term of ninety-nine years, at a peppercorn rent, and chambers for the judges have been built thereon.

More recently (*p*), however, the act of 17 Geo. 3, c. 59, has been repealed, though without reviving the statute of Charles, or disturbing existing leases; and the rolls estate is now vested in the Queen, as part of the possessions and land revenues of the crown, and is placed within the ordering and survey of

(*o*) 6 & 7 W. 4. c. 49.

(*p*) 1 Vict. c. 46.

the court of Exchequer in England, and is subject to the provisions, powers, and authorities, contained in the acts of 10 Geo. 4. c. 50, and 2 W. 4. c. 1, and to all such other provisions, powers, and authorities, in every respect, as the other possessions and land revenues of the crown within the ordering and survey of the said court of Exchequer are subject to. For further information on this subject the reader is referred to the section on Crown Leases (*q*).

x.—*Trustees in general.*

A trustee of lands, being owner of the legal interest, may grant leases at law which cannot be impeached so long as they are justified by the quantity of his estate (*r*). But a party taking a lease from a trustee with notice of the trust, and without the concurrence of the cestui que trust, is subject to the control of equity.

No specific term has been named which the court will deem applicable indiscriminately to all cases. It appears that the trustee may do what is *reasonable* (*s*), a term which renders a reference to the circumstances of each particular case indispensable; for what may be reasonable in one case may be very unreasonable in another. In one case (*t*), where a testator devised his real estates to trustees, upon trust, out of the yearly rents and profits, to pay certain annuities, and, subject thereto, to permit W. H. N. to receive the rents and profits for life, and after his decease to permit his wife to receive them for her life, with limitations over in favor of their children, it was held that the trustees had power to demise for a term of ten years. But with reference to a devise to A. in fee, in trust for his infant son, to be conveyed to him at the age of twenty-one, and without imposing terms

(*q*) Ante, p. 186.

(*r*) As to leases by cestui que trust, see ante, p. 123; by trustees of charities, post, p. 347.

(*s*) The Attorney-General *v.* Owen, 10 Ves. 555. 560.

(*t*) Naylor *v.* Arnitt, 1 Russ. & Myl. 501.

upon the trustee as to the rent or the length or terms of the lease, Lord Eldon held, that, although the trustee might do what was reasonable, he certainly could not alienate the land for ninety-nine years at a stationary rent (*u*).

Whatever may be the term for which the lease is granted, the burthen of proving its reasonableness devolves on the trustee, and the lessee claiming under him (*x*).

If trustees be possessed of renewable leaseholds upon trust for A. for life, with remainder to B. for life, and during A.'s life they imperfectly exercise a power of leasing vested in them, the acceptance by B. of the rent for nine years after his succession to the property on the death of A. will not preclude him from equitable relief against the lease, unless he be fully acquainted with the imperfection of the demise: but if he be conscious of the lessee's want of title, and, in consideration of his continuing tenant, consent to leave him undisturbed, that will amount, not to a confirmation of the lease, but to an agreement by which a court of equity will hold him (B.) bound for life, if the lease continue so long (*y*).

If leaseholds be bequeathed on trust for sale, the trustees cannot, in general, enforce a specific performance against a party contracting to take an underlease, their trust being *primâ facie* inconsistent with the granting of a lease (*z*). If circumstances exist which would justify a departure from the trust, the court cannot take them into consideration unless the cestuis que trust be parties to the suit (*a*).

In the case of *Jervoise v. Clarke* (*b*), a testator directed his estates to be sold; and it was referred to the master to inquire whether it would be for the benefit of the parties interested that leases of mines under the lands should be granted; and the master reported that it would be beneficial. The Vice-Chancellor doubted at first the propriety of

(*u*) *Attorney-General v. Owen*, 10 Ves. 555, 560.

(*x*) *Ibid.*

(*y*) *Bowes v. East London Waterworks Company*, 3 Madd. 375; S. C.

Judgment affirmed on appeal, *Jacob*, 324.

(*z*) *Evans v. Jackson*, 8 Sim. 217.

(*a*) *Ibid.*

(*b*) *Jervoise v. Clarke*, 6 Madd. 96.

this reference and report; but ultimately confirmed it, as the leases were also to be sold, and were only auxiliary to the sale of the estate.

The result is, that no one can be advised to rely on a lease by a trustee without the concurrence of the cestuis que trust, if competent to join, or the sanction of the court of Chancery in case of their incompetency (*c*). Leases by cestui que trust have been noticed in another place (*d*).

Trustees for ecclesiastical and eleemosynary corporations are by the acts of 5 Vict. sess. 2. c. 27 (*e*), and 5 & 6 Vict. c. 108 (*f*), directed to concur in leases made by their cestuis que trust. For the particulars the reader is referred to an earlier page (*g*).

XI.—Trustees of Charities.

The improvident, and at times the fraudulent, transactions connected with leases of charity estates (*h*) have occasioned a corresponding vigilance and rigour on the part of the court of Chancery as paramount trustee (*i*), as well to restrain every unfair deviation from the intention of the founder of the charity, as to relieve the parties aggrieved from the consequences of a partial or careless administration of their property: nor perhaps is the control of equity, in the wide range of its jurisdiction, more imperiously required, or more salutarily exercised, than in its application to dealings of the kind under consideration.

The circumstances calling for the interposition of that court are necessarily various, and admit of modification according to the complexion of each particular case; but the

(*c*) As to leases by infants, see ante, p. 28; by idiots, lunatics, &c., ante, p. 37.

(*d*) Ante, p. 123.

(*e*) Sect. 13.

(*f*) Sect. 28.

(*g*) Leases by ecclesiastical corporations, ante, pp. 266-7, & 281.

(*h*) Attorney-General *v.* Green, 6 Ves. 453. Attorney-General *v.* Griffith, 13 Ves. 580. Attorney-General *v.* Dixie, 13 Ves. 519. 530.

(*i*) Attorney-General *v.* Talbot, cited, 13 Ves. 571. Berkhamstead Free School, ex parte, 2 Ves. & B. 134. 14 Ves. 334. 3 Bla. Com. 427.

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See
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usual ground upon which leases of charity lands are sought to be annulled is the inadequacy of the consideration given for, or of the rent reserved upon them, without reference to their duration; a stronger reason for complaint of course arising when unreasonable length is added to the other cause of impeachment. Length of enjoyment under the demise, though not wholly disregarded by the court (*k*), does not operate as a bar to relief (*l*).

It is impossible to specify any exact period as the limit to which the continuance of the lease must be confined; for a multiplicity of collateral matters, such as the amount of rent, the stipulated expenditure for repairs or improvements, the circumstance of a fine being paid, the object of the demise, whether for agricultural or building purposes, and other similar considerations, must be duly weighed, before a conclusion respecting its reasonable or unreasonable length can be safely formed. The court has, therefore, cautiously abstained from laying down any precise rule as to the extent of the term which it will warrant (*m*).

It was Lord Eldon's opinion (*n*), that trustees of a charity were not bound to look with more providence to the affairs of the charity than their own; but in a late case (*o*), Lord Langdale considered that much more was expected from trustees acting for a permanent charity than could be expected from the ordinary prudence of a man in dealings between himself and other persons; that a man acting for himself might indulge his own caprices, and consider what was convenient or agreeable to himself, as well as what was strictly prudent, and his prudential motives could not afterwards be separated from the others which might have governed him; but that trustees of a charity, within the limits of their authority, whatever they might be, should be

(*k*) Attorney-General v. Hungerford, 8 Bli. New Rep. 437; S. C. 2 Cl. & Fin. 357.

(*l*) See the cases in this Chapter, *passim*.

(*m*) Attorney-General v. Owen, 10

Ves. 561. Attorney-General v. Cross, 3 Meriv. 530.

(*n*) Attorney-General v. Dixie, 13 Ves. 519, 534.

(*o*) Attorney-General v. Kerr, 2 Beav. 420, 426.

guided only by a desire to promote the lasting interest of the charity. And more recently (*p*) his lordship said, that there was necessarily a great difference between the dealing of an individual with his own property, and the dealing of a trustee with trust property; and that the trustee was not permitted to act as he pleased, or upon his own view of what was best, but that he was so to act as to be always prepared to show to the satisfaction of a court of equity that he had acted fairly and prudently in the administration of the trust, and for the benefit of the *cestuis que trust*.

Whatever may be the principle for regulating the conduct of the trustees, the intervention of the court always rests on the assumption that the lessors have been guilty of a breach of trust in making, and that the lessee has made himself accessory to that breach of trust in accepting, such lease (*g*): thus, a suspicion of mismanagement attaches itself to a lease for a long term of years absolute, at a stationary rent; because no man of a reasonable degree of providence would so let his own estate (*r*); and, therefore, generally speaking, an alienation for ninety-nine years, if a mere husbandry lease, and without adequate consideration (*s*), or a lease for seventy years or more, at an unvarying rent (*t*), (the value of such interests being but little inferior to the value of the inheritance (*u*),) and no other consideration than the rent forming an inducement to the contract (*x*), cannot be upheld: and this doctrine is fully supported by analogy; for there is

(*p*) *Attorney-General v. The South Sea Company*, 4 Beav. 453. 458.

(*g*) *Attorney-General v. Cross*, 3 Meriv. 539. *Attorney-General v. Moses*, 2 Madd. 308.

(*r*) *Attorney-General v. Cross*, 3 Meriv. 548. And see *Attorney-General v. Brooke*, 18 Ves. 326.

(*s*) *Attorney-General v. Owen*, 10 Ves. 555. *Attorney-General v. Morgan*, 2 Russ. 306. *Attorney-General v. Lord Hotham*, 1 Turn. & Russ. 209; S. C., affirmed on appeal, 3 Russ. 415. *Attorney-General v. Pargeter*, 6 Beav. 150. *Attorney-General v. The Cor-*

poration of Cashel, 2 Con. & Law. 1; S. C. 3 Drn. & War. 294. And see *Attorney-General v. East India Company*, 11 Sim. 380.

(*t*) *Attorney-General v. Griffith*, 13 Ves. 575. *Attorney-General v. Backhouse*, 17 Ves. 290-1. *Attorney-General v. Warren*, 2 Swanst. 304; S. C. 1 Wils. Ch. Ca. 387. *Attorney-General v. Foord*, 6 Beav. 288.

(*u*) *Ibid.* and 6 Ves. 452, and 10 Ves. 560.

(*x*) *Attorney-General v. Griffith*, 13 Ves. 575.

no instance of a power in a marriage settlement to lease for ninety-nine years, except with reference to very particular circumstances. The ordinary husbandry lease is for twenty-one years. Building leases are sometimes made under a settlement for sixty or ninety years, but not for the same rent during the whole time. There is no rent for the first two or three years, until the buildings are covered, and then they are at a rent, generally not increasing to the end of the lease, but increasing. So, upon a devise to one in fee, in trust for an infant son, to be conveyed to him at the age of twenty-one, no terms being imposed upon the trustee as to the rent or the length or terms of the lease, the court would say that the trustee might do what was reasonable; but it would be monstrous to hold that he could alienate the land for ninety-nine years at a stationary rent (*y*).

À fortiori, a term of 999 years is too extravagant to be countenanced, although there be a stipulation for expending money upon buildings, if that expenditure be commensurate only with a term of ninety-nine years (*z*). A case of this kind has occurred. In 1715, a charity estate, then let at 31*l.* a year, having upon it some buildings in a very dilapidated condition, was demised by the trustees to the grandfather of the defendant, for the term of 999 years, in consideration of an additional rent of 4*l.* a year, and the sum of 500*l.* at least to be laid out in repairs. The annual value when the information was filed amounted to between 90*l.* and 100*l.* The lease was ordered to be cancelled, and an account of the rents and profits from the decease of the late vicar (*a*) directed; the court deeming it impossible that a person taking in good faith would take such a lease; and declaring, that it was necessary in these cases, upon a general principle, to hold a strict hand over the lessees; for where trustees made a lease

(*y*) Attorney-General v. Owen, 10 Ves. 560.

(*z*) Attorney-General v. Green, 6 Ves. 452. Attorney-General v. Backhouse, 17 Ves. 291. Attorney-General v. Ladyman, 1 C. P. Coop. Ca. in Ch.

180-9. And see Attorney-General v. Ellison, 4 Sim. 233.

(*a*) What character the late vicar represented is not disclosed by the report.

to the destruction of the charity estate, it went on undiscovered for a vast while: but, on the defendant assenting to the arrangement, the decree was made without costs (*b*).

A lease of lands in England with a covenant for perpetual renewal falls within the same principle. Lord Thurlow frequently said (*c*), though he never got so far in judgment (*d*), that such a contract should never have been performed between man and man; but that trustees of a charity estate could part with that estate for ever, for a consideration not shown to be an equivalent for the inheritance, was a proposition generally not to be endured in the court of Chancery (*e*).

In an early case (*f*), indeed, a decree was made for a perpetual renewal of a lease for ninety-nine years, determinable on three lives, in consequence of the defendant's great grandfather having been at a great expense in recovering the lands belonging to the school at Wootton Underhedge, which had got into the hands of patentees as concealed lands; but the decision has not received universal approbation; its propriety having been canvassed first by Sir Wm. Grant, M. R., and afterwards by Sir Thomas Plumer, M. R. "I do not inquire," said the former (*g*), "by what authority Lord Coventry gave to an individual so large an interest in the charity estate. To the Great Seal, as superintending all property destined to charitable uses, powers might be supposed to belong beyond those which it would be competent for me, sitting in a mere judicial capacity, to exercise."—And Sir Thomas Plumer declared (*h*) that the court, in the case in question, had sanctioned alienation under a principle which it would then be a

(*b*) Attorney-General *v.* Green, sup.

(*c*) Tritton *v.* Foote, 2 Bro. C. C. 636; S. C. 2 Cox, 174. Rees *v.* Lord Dacre, cited, 9 Ves. 332; but more fully set out in 3 Hargr. Jurisc. Exer. 206-7, 237; and 1 Hargr. Jurid. Arg. 438, under the name of Reece *v.* Lord Dacre.

(*d*) Per Lord Eldon, 9 Ves. 330.

(*e*) Attorney-General *v.* Brooke, 18

Ves. 326. See also Gozna *v.* The Alderman and Burgesses of Grantham, 3 Russ. 261; and Lydiatt *v.* Foach, 2 Vern. 410.

(*f*) Attorney-General *v.* Smith, 2 Vern. 746.

(*g*) Watson *v.* The Master &c. of Hensworth Hospital, 14 Ves. 333-4.

(*h*) Attorney-General *v.* Warren, 2 Swanst. 303.

little difficult to recognize. These remarks and the observations of Lord Eldon (*i*) render it very improbable that such a claim could now be maintained, unless the party seeking the renewal could advance an extremely strong case in his favor.

Still, if, in consideration of extensive improvements made by the lessees, the lease contain a covenant for nine renewals at the end of every seven years, the court will not disturb it, in case the remaining renewals will amount to no more than a reasonable satisfaction and recompense to the lessee for his expenditure. In such a case, a reference would be directed to the Master to inquire what lasting improvements had been made, and money laid out, and how much the annual value of the charity had been increased by the lessee; and to inquire what was the just and real value of the lease when first granted to be then purchased, consideration being had to the continuance of renewals; and then when this was stated, it would appear whether the lessee had had sufficient satisfaction or not; for the court would take care that he had justice done him (*k*).

But in a case which occurred in Ireland (*l*), where, in 1710, the trustees of a charity, in consideration of a fine of 300*l.*, and an annual rent of 100*l.*, made a lease for lives, with a covenant for perpetual renewal, on payment of a fine of 25*l.* on the fall of each life, which was accordingly renewed in 1782, the court of Chancery in Ireland, and afterwards the House of Lords in England, having regard to the circumstances of the times, and the usual practice of leasing at that time, and in that country, refused to set aside the transaction on the ground of improvidence and breach of trust.

It must not, however, be received as an inflexible rule, that in no case whatever can trustees of estates devoted to charitable purposes grant leases for long terms, or even absolutely

(*i*) In *Attorney-General v. Brooke*, 18 Ves. 326.

(*k*) *Attorney-General v. Baliol College Oxford*, 9 Mod. 407; S. C. Duke's

Charit. Uses, 268, Bridgm. edit.

(*l*) *Attorney-General v. Hungerford*, 3 Bli. New Rep. 437; S. C. 2 Cl. & Fin. 357.

alien the trust property (*m*). Circumstances may justify a departure from the ordinary course; and, accordingly, in a very recent case (*n*), the Master of the Rolls refused to set aside a lease granted to the South Sea Company for 999 years, at a fixed rent of 45*l.*, as the transaction appeared to be fair and beneficial to the charity at the time, the property let consisting of dilapidated buildings in an obscure part of the city, yielding an uncertain and inconsiderable rental, and the company having erected part of the South Sea house and other valuable buildings on the site.

But with so much jealousy does the court regard these transactions, that it imposes upon those dealing for and with the estate the burthen of proving the lease to be a reasonable one, and for the benefit of the charity. This has often been decided (*o*); and Lord Eldon, enforcing the doctrine laid down in the *Attorney-General v. Owen*, with great emphasis repeated that very general proposition as his judicial opinion (*p*).

The late case of the *Attorney-General v. Kerr* (*q*) furnishes an illustration of these remarks. In the year 1745, the corporation of Northampton granted a lease of certain property of which they were trustees for a charity, for a term of twenty-one years, at a rent of 8*l.* In 1763, before the expiration of the former lease, they granted a reversionary lease to the same lessee for twenty-one years, commencing from 1766, at a rent of 8*l.*, and a fine of 25*l.* In 1769, they granted to the lessee another reversionary lease for sixty years, to commence in 1787, at a rent of 9*l.*, the lessee covenanting to take down the then existing messuage, and to build one or more dwelling-houses, and to keep them in

(*m*) *Attorney-General v. Warren*, 2 Swanst. 303; S. C. 1 Wils. Ch. Ca. 387. *Attorney-General v. Hungerford*, sup.

(*n*) *Attorney-General v. The South Sea Company*, 4 Beav. 453.

(*o*) *Attorney-General v. Owen*, 10 Ves. 560. *Attorney-General v. Grif-*

fith, 13 Ves. 575. *Attorney-General v. South Sea Company*, 4 Beav. 453.

(*p*) *Attorney-General v. Brooke*, 18 Ves. 326.

(*q*) *Attorney-General v. Kerr*, 2 Beav. 420; and 4 Beav. 297, as to costs.

repair. On 10th of December, 1784, Dr. Kerr became the purchaser of the residues of the terms created in 1763 and 1769; and, on the 18th of that month, the corporation granted him a further reversionary lease for thirty-nine years, to commence at Michaelmas, 1847, at a rent of 18*l.*; and Kerr covenanted to lay out 500*l.* in building one or more messuages, with convenient out-offices, on the premises; and that, in case he should take down the buildings then being thereon, he would expend 1000*l.* in buildings, and keep them in repair. At the time of granting this lease there was a term of sixty-two years and three-quarters unexpired of the old leases, which being added to the new reversionary term of thirty-nine years made a period of 101 years and three-quarters. Dr. Kerr then laid out considerable sums on the property, and by indenture, reciting that he had laid out more than 500*l.*, and that the corporation were convinced that it was for the benefit of the charity, they, in consideration of the surrender of the two last leases, and of the fee-farm rent reserved, conveyed the property absolutely to Dr. Kerr, subject to a clear yearly fee-farm rent of 12*l.*, and a fine of 10*s.* at the end of twenty-one years for ever. The Master of the Rolls considered that it would be utterly irreconcilable with every principle on which property could be advantageously dealt with to allow the transaction to stand, either as regarded the conveyance of the fee, or the grant of the reversionary lease of 1784; but refused to disturb the lease of 1769, not being satisfied that it was an imprudent transaction on the part of the corporation: and his lordship directed an inquiry to ascertain whether Dr. Kerr's expenditure had been incurred with reference only to the enjoyment under the lease of 1769, or in consequence of the extension of the term in 1784, deeming it equitable, in the latter case, that some compensation should be made to him in that respect. But ornamental expenditure was not to be allowed.

It is not enough to say that the mode of letting is not the best that might be prescribed, because, on such a point, there may be a great difference of opinion among the most ex-

perienced; but it must be shown that the mode is so positively bad that no persons meaning fairly to discharge their trust would have resorted to it (*r*); and the question, therefore, is, whether, under all the circumstances, the alienation was a breach of trust, or whether the contract was not for the benefit of the charity (*s*). Upon this ground, the court on a late occasion (*t*) refused to avoid a reversionary lease for ninety-nine years determinable on two lives. The facts (in an abridged shape) were as follow:—Nicholas Spicer, then late one of the aldermen of the city of Exeter, on the 3rd of March, 1609, enfeoffed Jordaine and Crossinge, and six others (deceased), in fee, of certain hereditaments, among other purposes, upon certain charitable trusts; and on the 20th of August, 1689, Jordaine and Crossinge granted and enfeoffed unto the mayor, bailiffs, and commonalty, of the said city, all the said premises, upon the same trusts. It appeared that the mayor, &c., on the 2nd of June, 1772, in consideration of 630*l*., demised to one Edward Cross a certain messuage and premises, called Slow-lake, comprising the principal part of the charity estates, for ninety-nine years, if the said Edward Cross, then aged twenty-two, and Betty his wife, then aged twenty-nine, or either of them, should so long live, to commence immediately after the surrender or other sooner determination of a former lease made in 1727, determinable on the life of a person then in existence, at the yearly rent of 20*l*.: and that, by another indenture, dated the 24th of November, 1801, the mayor, &c., in consideration of 1050*l*., demised to the said Edward Cross the same premises for the term of ninety-nine years, if John Cross, then aged twenty-six, and Sarah Cross, then aged sixteen, or either of them, should so long live, to commence on the death of the said Edward Cross, or the surrender or other sooner determination of the lease of 1772, at the like yearly rent of 20*l*. Similar leases

(*r*) Attorney-General *v.* Cross, 3 Meriv. 524. Attorney-General *v.* Hungerford, 8 Bli. New Rep. 437. 461; S. C. 2 Cl. & Fin. 379.

(*s*) Attorney-General *v.* Warren, 2 Swanst. 303; S. C. 1 Wils. Ch. Ca. 337.

(*t*) Attorney-General *v.* Cross, sup.

had been from time to time granted, and were then in existence, of other smaller parts of the charity estates. And it appeared that Nicholas Spicer, the feoffor, had in his lifetime granted leases of the charity estates for lives at small rents; and that, since his death, the feoffees of the said estates had from time to time granted leases thereof for lives at small rents, reserving fines. And it further appeared by the answer that the defendants and their predecessors had from time to time let the charity estates in such manner as seemed to them likely to be most productive; and that the ordinary and accustomed practice with respect to letting of lands in the county of Devon had thitherto been to grant leases for ninety-nine years, or other long terms, determinable on three lives, in consideration of fines, and reserving only a small rent; which mode of letting had usually been adopted, not only with respect to houses and buildings, but generally with respect to lands let for the purpose of husbandry only; and that, upon the dropping of one or two of the lives named in such leases, it was usual to grant a fresh lease for another long term of years in reversion, or upon the surrender of the then existing lease. The information, which prayed that the lease might be decreed void, and the indenture delivered up and cancelled, was finally dismissed; the Master of the Rolls (Sir Wm. Grant) declaring, that though the expediency of letting charity estates in this manner might be more or less questionable according to the nature of the charity, and the circumstances and situation of the estate, yet he was not aware of any principle or authority on which it could be held that such a lease was, on the very face of it, an abuse of trust. "The legislature" (continued his honor) "has, both in enabling and disabling statutes, considered leases for three lives as on a footing with leases for twenty-one years absolute. So have many founders of charities who prohibited the letting on leases for more than three lives or twenty-one years. It would be a strong thing to say that in such case a lease for three lives would be void. Supposing, however, that, where charity estates had usually been let for twenty-one years, it would

be considered as improper to substitute a letting for lives, it does not follow that we can impute abuse to a mere adherence to the ancient and uniform mode of letting, especially when it is a mode usual in the district in which the estates are situated" (*u*). The information, however, was dismissed without costs.

As in some cases it may be expedient to take fines, and in others to let at the best annual rent (*x*), a lease is not impeachable merely on the ground of a fine having been taken (*y*). In a recent case (*z*), where the mode of letting had not been altered for more than 200 years, the court, on the authority of the Attorney-General *v. Cross* (*a*), refused to disturb leases that had been granted for lives, at a fine, or to declare that future leases should not be granted except at the actual improved value thereof without fine or foregift. In this case the information was dismissed with costs.

It may be stated as a general rule, that the court will not rescind a transaction which was perfectly fair at the time, on the ground of the property demised having become more valuable from adventitious circumstances (*b*).

It will be observed, that, in the preceding cases, the trustees were guided solely by their own discretion with regard to the duration of their demises: but where the founder of a charity prescribes a definite time as the utmost limit of leases to be granted by his trustees, they cannot exceed the terms of their power (*c*), either by direct or indirect means (*d*); nor has the

(*u*) See also Attorney-General *v. Price*, 3 Atk. 109, 110. Attorney-General *v. Warren*, 2 Swanst. 303; S. C. 1 Wils. Ch. Ca. 387. And Attorney-General *v. Hungerford*, 8 Bli. New Rep. 437; S. C. 2 Cl. & Fin. 357.

(*x*) Attorney-General *v. Cross*, 3 Meriv. 540.

(*y*) Ibid. And see Attorney-General *v. Price*, 3 Atk. 110.

(*z*) Attorney-General *v. Crook*, 1 Keen, 121.

(*a*) Sup.

(*b*) Attorney-General *v. Pembroke Hall*, 2 Sim. & Stu. 441; S. C., affirmed

on appeal, 1 Russ. & Myl. 751. Attorney-General *v. Hungerford*, 8 Bli. New Rep. 437; S. C. 2 Cl. & Fin. 357.

(*c*) Attorney-General *v. Griffith*, 13 Ves. 565, 576. *Watson v. Hinsworth Hospital*, 2 Vern. 596; S. C. 1 Eq. Ca. Ab. 100. pl. 8. *Watson v. The Master &c. of Hensworth Hospital*, 14 Ves. 324, 333.

(*d*) *Lydiatt v. Foach*, 2 Vern. 410. *Taylor v. Dulwich Hospital*, 1 P. Wms. 655; S. C. 2 Eq. Ca. Ab. 198. pl. 2. Attorney-General *v. The Master of Hensworth Hospital*, 14 Ves. 333.

court jurisdiction to order leases for a more extensive term. In a modern case (*e*), the then late Vice-Chancellor (*f*) had directed a reference to inquire whether leases for ninety-nine years would not be more beneficial to the charity than leases for twenty-one years, the latter being the period specified by the founder; and, on the Master's reporting in the affirmative, the succeeding Vice-Chancellor (*g*) confirmed that report, as the order for reference had been made by the judge who preceded him; "but (said he) I would not take such a lease under the order of this or any other court of equity. There must be an act of parliament to render legal such deviation from the founder's intention."

But it appears that the court has authority to control a power, conferred by the founder, of leasing for three lives or thirty-one years, if it should appear for the benefit of the charity not to act upon that power (*h*).

Undervalue, if considerable, is also a ground for the court's intervention (*i*); and where that can be proved the short duration of the term is deemed immaterial. Nor is it important whether the lessors be mere trustees, or possess also a beneficial interest in the charity estate; such leases are not to be encouraged under any circumstances, as the trustees are guilty of a dereliction of their duty, and the lessees get the land at an inadequate rent (*k*).

But to justify the subversion of a lease on the score of insufficient consideration, it must be an under-value satisfactorily proved, and considerable in amount. It is not enough to show that a little more might have been got for the estate than has actually been reserved (*l*). Nor is the circumstance

(*e*) *Attorney-General v. Mayor of Rochester*, 2 Sim. 34; and see *Attorney-General v. Warren*, 2 Swanst. 302-3.

(*f*) Sir John Leach.

(*g*) Sir Anthony Hart.

(*h*) *Berkhampstead Free School, Ex parte*, 2 Ves. & B. 138. And see *Watson v. Hinsworth Hospital*, 2 Vern. 596; S. C. 1 Eq. Ca. Ab. 100. pl. 8.

(*i*) *Reresby v. Farrer*, 2 Vern. 414. 1 Eq. Ca. Ab. 100. pl. 7. *East v. Ryal*, 2 P. Wms. 284; S. C., nom. *Pugh v. Ryal*, Sel. Ca. in Ch. 40; 2 Eq. Ca. Ab. 199. pl. 6. *Attorney-General v. Lord Gower, or Gore*, 9 Mod. 224; S. C. *Barnard*, Ch. Rep. 145. 152. *Attorney-General v. Wilson*, 18 Ves. 518.

(*k*) *Attorney-General v. Wilson*, sup.

(*l*) *Attorney-General v. Cross*, 3

of an underlease being granted at a large premium, and a higher rent than that paid by the original lessee, of itself conclusive evidence of undervalue (*m*); for an important part of the increase may be ascribed, not to the intrinsic value, but the good-will established, as in the case of the property consisting of a public-house, and to the money laid out in repairs by the lessee. In the case last cited (*n*), the master was directed to inquire, whether the rent reserved by the lessors was fair and adequate; and, in considering the value of the premium received for the underlease, to distinguish how much resulted from the good-will and the repairs, and how much from the value of the lease above the rent reserved by the lessors.

Nor does it follow that a tenant who has got a lease of a charity estate at too low a rent with reference to the actual value, is of necessity to be turned out, if it appear that he himself has acted fairly and honestly (*o*). The only ground for so dealing with him would be some evidence or presumption of collusion or corruption of motive. The circumstance of the tenant being a relation of the trustee furnishes a ground of suspicion (*p*); but if the trustee, or one of the governors of the charity, be himself the tenant, though nothing wrong in a moral point of view can be imputable to him, or the other governors, yet, according to the general rule adopted in equity for the purpose of guarding against possible fraud, the court will not allow him to remain lessee of the lands, which, as trustee or governor, it was his duty to let at the greatest possible advantage (*q*). It ought, however, to be remembered, that the case of a charity estate is one in which, of all others, the security of the rent is the first object to be regarded;

Meriv. 541. Attorney-General *v.* Hungerford, 8 Bli. New Rep. 437. 461; S. C. 2 Cl. & Fin. 357.

(*m*) Attorney-General *v.* Cross, sup. Attorney-General *v.* Magwood, 18 Ves. 315.

(*n*) Attorney-General *v.* Magwood, sup.

(*o*) Ex parte Skinner; in the matter

of the Lawford Charity, 2 Meriv. 453. 457; S. C. 1 Wils. Ch. Ca. 14. Attorney-General *v.* Hungerford, sup.

(*p*) Ex parte Skinner; in the matter of the Lawford Charity, 2 Meriv. 457; S. C. 1 Wils. Ch. Ca. 14.

(*q*) Attorney-General *v.* Dixie, 13 Ves. 519. 531. 534. Attorney-General *v.* Earl of Clarendon, 17 Ves. 500.

and, therefore, in such cases, the inadequacy of the rent is less a badge of fraud than it would be in almost any other instance (*r*).

The discovery of the fact of undervalue, depending, as it necessarily must, on numerous relative circumstances, and involved in obscurity in proportion to the remoteness of the transaction, is occasionally surrounded by difficulties of the most perplexing character. From the conflicting nature of the evidence adduced, it is sometimes next to impossible to elicit any data, or establish any position, as a safe or satisfactory guide to the judgment. Surveyors very seldom concur in opinion (*s*). In one case (*t*), for instance, a message was estimated by different witnesses to be of the annual value of 55*l.*, 50*l.*, and 30*l.* But in one of later decision (*u*), the difference was rather more startling. Witnesses were examined on both sides, and a good deal of contradictory evidence produced, as to the value of the estate at the respective times of granting certain leases in 1772, 1801, and 1814, and filing the original information, and the proportion of the several fines paid and of the rent reserved to such annual value. The same, according to the witnesses for the plaintiff, was made to amount in 1772 to 80*l.*, in 1801 to 180*l.*; and in 1814 to 230*l.*, exclusive of outgoings; while the witnesses for the defendants differed in their opinions as to value, making it from 40*l.* to 65*l.* at the first, from 106*l.* to 150*l.* at the second, and from 100*l.* to 130*l.* at the third, of the above periods. These examples furnish additional and painful proof, if additional proof be wanting, of the uncertainty and insecurity of human testimony.

When, however, these differences occur, the testimony of witnesses who have never had occasion to survey the premises with a view to a correct estimate of their value, but who, upon a loose recollection of the several circumstances that entered

(*r*) *Ex parte Skinner*; in the matter of the Lawford Charity, *sup.* 13 Ves. 317.

(*u*) *Attorney-General v. Cross*, 3 Meriv. 535.

(*s*) 10 Ves. 560.
(*t*) *Attorney-General v. Magwood*,

into their computation at a distant period, offer opinions as to their value at that period, cannot be put into any degree of competition with the evidence of persons who made a survey for that express purpose at the granting of the lease, particularly where neither the skill nor integrity of the surveyor can be impeached, nor improper motives for undervaluing the land imputed to him (*x*). These considerations suggest the policy of having the estate valued by a surveyor of skill and reputation previously to a lease being granted.

In administering relief, the mode may differ with the peculiarities of the case; but where the lease has been granted for an unreasonable term, the court usually decrees its cancellation (*y*); if inadequate consideration form a ground of complaint, the payment of an additional rent, generally computed from the filing of the information, or previous demand by the relators (*z*), is decreed against the lessee (*a*). But, as equity cannot relieve without being acquainted with the terms of the original contract, in cases of uncertainty, where, for example, the surrender of a former lease formed part of the consideration, an inquiry will be directed to ascertain whether the lease were reasonable at first, regard being had to the rent reserved, the money expended in building, or otherwise, and the duration of the term (*b*).

A specific prayer for an account of the rent is not requisite. The rule in cases of charity is almost universal, that the general prayer is sufficient; and the relief will be adapted to the case (*c*), even although the information prays wrong relief (*d*).

(*x*) Attorney-General *v.* Cross, 3 Meriv. 542.

(*y*) Yervel Poor *v.* Sutton, Duke's Charit. Uses, 43, Bridgm. edit. 628. Attorney-General *v.* Green, 6 Ves. 452. Attorney-General *v.* Owen, 10 Ves. 555. Attorney-General *v.* Griffith, 13 Ves. 565. 569. Attorney-General *v.* Hotham, 1 Turn. & Russ. 209; S. C., affirmed on appeal, 3 Russ. 415.

(*z*) Attorney-General *v.* Green, *sup.* Attorney-General *v.* Owen, *sup.* Attorney-General *v.* Griffith, *sup.*

(*a*) Ibid. Yervel Poor *v.* Sutton,

sup. Eltham Parish *v.* Warreyn, Duke's Charit. Uses, 67, Bridgm. edit. 641. Wright *v.* Newport Pond School, Duke's Charit. Uses, 46, Bridgm. edit. 649. Reresby *v.* Farrer, 2 Vern. 414. 1 Eq. Ca. Ab. 100. pl. 7. Smith *v.* Stowel, 1 Ch. Ca. 195.

(*b*) Attorney-General *v.* Backhouse, 17 Ves. 233. Attorney-General *v.* Magwood, 18 Ves. 315.

(*c*) Attorney-General *v.* Brooke, 18 Ves. 319.

(*d*) Attorney-General *v.* Whiteley, 11 Ves. 247.

The court does not permit its feelings upon the abuse of a charity estate to carry it beyond what is just, even against those who are guilty, much less against innocent parties (*e*); therefore, if the lease be valid at law, equity will not set it aside without allowing for lasting (*f*), though not for merely ornamental (*g*), improvements. And it would appear, that, if, under a covenant to build, buildings be erected, not *ejusdem generis*, but equally beneficial to the charity as if they had been made pursuant to the stipulation, the court would be unwilling to hold that the charity, after a great lapse of time, should have both the buildings and the price due, upon the principle of waste, by the failure to perform the covenants (*h*).

So, the enjoyment of an under-lessee is seldom disturbed (*i*). The court, feeling the extreme hardship upon those who have given a full consideration, usually mitigates the decree with regard to their interests, by merely directing them to pay the rent to other persons than those to whom they had contracted to pay it; for, as the interests of those persons may be very fair as between them and those from whom they take, the relief is adapted to the conduct of the parties, as the court finds them respectively to have acted fairly or not towards the trust (*k*).

The same indulgence is extended to a party purchasing the under-lessee's interest; for though the purchaser of a lease has never been considered as a purchaser for valuable consideration without notice, to the extent of not being bound to know from whom the lessor derived his title, yet no case has gone the length of saying that he is to take notice of all the circumstances under which the lessor derived that title. The purchaser of the underlease must be understood at least to

(*e*) *Attorney-General v. Backhouse*, 17 Ves. 292. And see *Attorney-General v. Griffith*, 13 Ves. 579.

(*f*) *Attorney-General v. Baliol College*, 9 Mod. 407. 411; *S. C. Duke's Charit. Uses*, 268, Bridgm. edit. *Attorney-General v. Kerr*, 2 Beav. 420. But see *Attorney-General v. Griffith*, 13 Ves. 580.

(*g*) *Attorney-General v. Kerr*, 2 Beav. 420.

(*h*) *Attorney-General v. Backhouse*, 17 Ves. 292.

(*i*) *Ibid.* *Attorney-General v. Griffith*, 13 Ves. 565. *Attorney-General v. Foord*, 6 Beav. 288.

(*k*) *Attorney-General v. Backhouse*, 13 Ves. 292.

have notice that the original lessors were trustees for a charity; but not that the lease was bad; that depending upon a number of circumstances dehors the lease (*l*).

On the other hand, the court, in setting aside an improper charity lease, will not allow the personal covenants of the trustees for quiet enjoyment to remain in operation; but the transaction will be annulled *in toto* (*m*).

Costs in these cases are usually visited on the lessee (*n*), though circumstances may require a different course of proceeding. In the case of the Attorney-General *v.* Owen (*o*), the lessee was not burthened with costs, as he undertook to give up the lease without trouble; but Lord Eldon declared that the case was not to be considered as an authority with reference to persons taking leases of charity estates, and that in future they would not get off so easily. In a later case (*p*), application being made on behalf of the persons entitled under the lease, that the decree against them should be without costs, the Chancellor at length assented, but with great reluctance; desiring it to be understood that it was upon the ground that the information was filed before the decision of the two late cases (*q*); and that he should not be prevailed on to refuse costs thereafter in any case upon an information filed since those cases; and afterwards, in the Attorney-General *v.* Cross (*r*), the information was dismissed without costs, though the Master of the Rolls refused to disturb the possession of the lessee.

So, if the governors of a charity have been extremely negligent in their trust, although guiltless of corruption, the court will punish them with some costs (*s*).

(*l*) Attorney-General *v.* Backhouse, 17 Ves. 283. See also Attorney-General *v.* Pargeter, 6 Beav. 150.

(*m*) Attorney-General *v.* Morgan, 2 Russ. 306.

(*n*) East *v.* Ryal, 2 P. Wms. 234; S. C., nom. Pugh *v.* Ryal, Sel. Ca. in Ch. 40.

(*o*) 10 Ves. 562. See also Attorney-

General *v.* Green, 6 Ves. 452.

(*p*) Attorney-General *v.* Griffiths, 13 Ves. 581.

(*q*) Attorney-General *v.* Owen, and Attorney-General *v.* Green, sup.

(*r*) 3 Meriv. 524. 542.

(*s*) East *v.* Ryal, 2 P. Wms. 234; S. C., nom. Pugh *v.* Ryal, Sel. Ca. in Ch. 40.

The fact of the demised property being the subject of a charitable trust is sometimes contested. In 1710, the corporation of Grantham, in consideration of upwards of 80*l.*, granted a lease of two messuages for a term of twenty-one years, at a yearly rent of 4*l.*; and they covenanted to grant, at all times and for ever, new leases for a like term, and at the same rent, on payment of a fine of five shillings. The lease had been renewed from time to time until the year 1814; and the bill was filed by the person entitled to the benefit of the covenant to compel the corporation to grant a renewed lease. The defence made by the corporation was, that the property had been devised to them on charitable trusts, and that the covenant for perpetual renewal was a breach of trust. The only evidence of the premises being subject to a charitable trust was, that the 4*l.* of yearly rent had been long applied in purchasing four blue coats for four poor men of the town of Grantham. This application of the money was traced back as far as the year 1769. The Master of the Rolls thought that the evidence did not entitle him to presume that the property was held in trust for a charity in 1710; and he therefore gave the plaintiff a decree for the renewal of the lease, with costs (*t*).

So, where a private act of parliament (*u*) conferred a power on the vicar of the parish for the time being to lease certain waste lands "for such term or number of years, at and under such rent, reservations, or payments, as to him should seem meet"; and, by virtue of this act, the vicar, in the years 1716 and 1719, granted three distinct leases of parts of the premises to three different persons, for 1000 years, 999 years, and 1000 years, respectively, which, upon the principle acted upon in the cases of charity leases for unreasonable terms, were sought to be set aside as excessive executions of the power, and in effect a complete alienation of the estate; the Vice-Chancellor denied the resemblance

(*t*) *Gozna v. The Alderman and Burgesses of Grantham*, 3 Russ. 261.

(*u*) 1 Geo. 1. stat. 2. c. 42.

contended for between these leases and leases granted by trustees of a charity, and refused to disturb them (*x*).

And a case (*y*) similar in almost all respects, and founded on a lease granted under the same act of parliament, was soon afterwards brought under the consideration of Lord Eldon, who concurred in decision with the Vice-Chancellor, but could not refrain from expressing his persuasion that in the act the legislature had gone further than it intended. "It was argued," said his lordship, "that the vestrymen were to be considered in the nature of trustees, and that, therefore, the leases are to be treated as if made by trustees of a charity; but I find it difficult to accede to that reasoning. When the legislature, with respect to ecclesiastical persons, has said that they may make such leases as to them shall seem meet, it is difficult for a court of equity, at the distance of 100 years, to say what were the terms on which such leases should have been granted, particularly when the premises were to be improved in the manner in which these were. And, therefore, notwithstanding I am of opinion that this act gives a power beyond what was intended, yet I do not think that a court of equity has a right to cut down leases that are within the express terms of it."

Municipal corporations have been deprived of the management of estates confided to them in trust for charities, by a late act (*z*), which, after noticing that divers bodies corporate stood seised or possessed of sundry hereditaments and personal estate, in trust in whole or in part for certain charitable trusts, and that it was expedient that the administration thereof should be kept distinct from that of the public stock and borough fund, enacted (*a*), that in every borough in which the body corporate, or any one or more of the members of such body corporate, in his or their corporate capacity, then stood solely, or together with any person or persons elected solely by such body corporate, or solely by

(*x*) Attorney-General *v.* Moses, 2 cob, 307.

Madd. 294.

(*z*) 5 & 6 W. 4. c. 76.

(*y*) Attorney-General *v.* Wray, Ja-

(*a*) Sect. 71.

any particular number, class, or description of members of such body corporate, seised or possessed, for any estate or interest whatsoever, of any hereditaments, in whole or in part in trust or for the benefit of any charitable uses or trusts whatsoever, all the estate, right, interest, and title, and all the powers, of such body corporate, or of such member or members of such body corporate, in respect of the said uses and trusts, should continue in the persons who at the time of the passing of the act were such trustees, notwithstanding that they might have ceased to hold any office by virtue of which before the passing of the act they were such trustees, until the 1st day of August, 1836, or until parliament should otherwise order, and should immediately thereupon utterly cease and determine. And, after providing for the supplying of vacancies among the trustees before the said 1st day of August, the act declared that, if parliament should not otherwise direct on or before the said 1st day of August, 1836, the lord high Chancellor, or lords commissioners of the great seal, should make such orders as he or they should see fit for the administration, subject to such charitable uses or trusts, of such trust estates.

No further provision having been made by parliament, the administration of these charity trusts is now vested in the court of Chancery; but a difficulty will arise as to the granting parties on the occasion of any future lease, the act having declared that the estate of the corporation in the trust property shall cease and determine, without having provided a substitute to convey the legal estate.

XII.—*Executors and Administrators.*

An executor or administrator may demise the premises which devolve on him in either of those capacities (*b*); but on this subject a difference exists between the offices of

(*b*) Bac. Ab. Leases, (I). 7. *Keating v. Keating*, Lloyd & Goo. Ca. temp. Sugd. C., 133.

executor and administrator. An executor, deriving his power from the testator (*c*), may lease before probate (*d*); but as the letters of administration alone constitute the title of an administrator, it follows that, until invested by the ordinary with the office of administrator (*e*), he cannot exercise any act of ownership over the intestate's leaseholds.

Several executors are regarded as an individual person, and have a joint and entire interest in the testator's property (*f*); and, hence, the lease of one of several executors is as efficacious as their joint demise (*g*), although it purport to be the grant of all (*h*). In this respect their interest differs from that of joint-tenants, or tenants in common; the grant of one of several joint-tenants or tenants in common operating only on the share of the granting party (*i*).

Joint administrators were formerly considered as standing in a different position; and it was deemed necessary to obtain the concurrence of all (*k*): the distinction, however, is now exploded, and the offices of executor and administrator are in this respect assimilated (*l*).

If a term be bequeathed to an executor for life, with remainders over, his right, as executor, to assign the whole term, or to underlet the premises for any period, will not be abridged by a limited power of leasing given to him by the will (*m*).

As the marriage of a feme executrix, or administratrix, transfers to the husband the whole right of administration,

(*c*) Toll. Ex., 5th Ed. 95. Anon. Dy. 367, a. Rol. Ab. Executors, (A). Hudson v. Hudson, 1 Atk. 460.

(*d*) Rol. Ab. Executors, (A). Roe dem. Bendall v. Summerset, 2 W. Blac. 692-4.

(*e*) Toll. Ex., 5th Ed. 95. Wankford v. Wankford, 1 Salk. 301; S. C. 3 Salk. 162; Holt, 311; 11 Mod. 38. Hudson v. Hudson, 1 Atk. 461.

(*f*) Toll. Ex. 242. Com. Dig. Administration, B. 12. Anon. Dy. 23, b. Jacomb v. Harwood, 2 Ves. 267.

(*g*) Anon. Dy. 23, b. Pannel v.

Fenn, Cro. Eliz. 347; S. C. Mo. 350; Gould. 185. Rol. Ab. Executors, (O). Doe dem. Hayes v. Sturges, 7 Taunt. 217, 222; S. C. 2 Marsh. 505. Simpson v. Gutteridge, 1 Madd. 609, 616. Jacomb v. Harwood, 2 Ves. 267.

(*h*) Simpson v. Gutteridge, 1 Madd. 609, 616.

(*i*) See ante, pp. 124, & 131.

(*k*) Hudson v. Hudson, 1 Atk. 460.

(*l*) Jacomb v. Harwood, 2 Ves. 265-7. Willand v. Fenn, cited, Ibid. 267-8.

(*m*) Doe dem. Hayes v. Sturges, 7 Taunt. 217; S. C. 2 Marsh. 505.

her sole demise cannot be supported. He must, therefore, be the granting party in all leases made in right of such executorship or administration (*n*); nor is her concurrence necessary (*o*).

If a party to whom administration is granted generally, *ratione minoris ætatis*, without any restraint or limitation, grant a lease for a term exceeding the duration of the infancy, it will be good at all events until the executor attain his majority (*p*), and, according to the opinion of some, until he enter to defeat it (*q*). Formerly, the authority of an administrator appointed during the minority of an executor ceased on the minor's attaining the age of seventeen years (*r*); but the inconveniences arising from the practice of granting probate to persons under the age of twenty-one were removed by the statute of 38 Geo. 3. c. 87, which enacts (*s*), that, where an infant is sole executor, administration with the will annexed shall be granted to the guardian of such infant, or to such other person as the spiritual court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him. And further (*t*), that the person to whom such administration shall be granted shall have the same powers vested in him as an administrator now hath by virtue of an administration granted to him *durante minore ætate* of the next of kin.

And by the same act provision is made against the delays occasioned by the residence out of the jurisdiction of the courts of executors to whom probate hath been granted. Section the 1st enacts, that, at the expiration of twelve

(*n*) Jenk. Cent. 79, case 56. Arnold v. Bidgood, Cro. Jac. 318. Thrustout dem. Levick v. Coppin, 2 W. Blac. 801; S. C. 3 Wils. 277.

(*o*) Ibid.

(*p*) Sir Moyle Finch's case, 6 Co. 63, a. b. 67, b. And see Prince's case, 5 Co. 29, b.; S. C., nom. Price v. Simpson, Cro. Eliz. 718; S. C., nom. Prince v. Sympton, 2 And. 132.

(*q*) Sir Moyle Finch's case, 6 Co. 67, b.

(*r*) Dubois v. Trant, 12 Mod. 436. Atkinson v. Cornish, 1 Ld. Raym. 338; S. C. Carth. 446; 5 Mod. 395. Freke v. Thomas, 1 Ld. Raym. 667; S. C. Com. 110; 1 Salk. 39.

(*s*) 38 Geo. 3. c. 87. s. 6.

(*t*) Sect. 7.

calendar months from the death of any testator, if the executors or executor to whom probate of the will shall have been granted are or is then residing out of the jurisdiction of his Majesty's courts of law and equity, it shall be lawful for the ecclesiastical court which hath granted probate of such will, upon the application of any creditor, next of kin, or legatee, grounded on the affidavit thereafter mentioned, to grant such special administration as thereafter is also mentioned. And the second section requires the party applying for the administration to make an affidavit that there is a debt owing to him from the testator's effects, and that he is desirous of exhibiting his bill for the purpose of being paid his demand. The third section prescribes the form of the administration.

It is observable, that the authority of an administrator under this act is only voidable, not void, on the decease of the executor (*u*).

Where an executor or administrator grants a lease in that capacity, his executor is entitled to the rent in preference to an administrator *de bonis non* of the original testator or intestate, whose title is necessarily paramount that of the lessor (*x*).

But where an administratrix underlet a portion of her intestate's leasehold property, and covenanted that she, her executors, administrators, and assigns, would renew as often as she or they should obtain a renewal from the superior landlord, it was held, that the lessee might, on her death, enforce a specific performance of the covenant against an administrator *de bonis non* of the intestate. The chancellor said that the act of the administratrix was both a legal and equitable disappropriation from the assets of the intestate, and that the administrator *de bonis non*, who had entered into the receipt of the rents reserved by the lease, had no

(*u*) *Taynton v. Hannay*, 3 Bos. & Pul. 26; *Alvanley, C. J.*, dissent.

(*x*) *Drew v. Bayly*, 2 Lev. 100; S. C. 3 Keb. 298, 427. 463. 495. 549; S. C., nom. *Drue v. Baily*, or *Baylye*,

1 Vent. 275; *Freem.* 392, 402; cited as *Davie v. Drew*, alias *Drewry*, 1 Vern. 94. *Norton v. Harvey*, 1 Vent. 259. See also *Latch*, 266-7.

right to do so unaffected by the acts and covenants of the administratrix, and that the lands were in his hands bound by the covenant if they were so in hers (*y*).

As a practical caution, we may mention, that a person proposing to take from an executor a lease of premises specifically bequeathed to another, should obtain, if possible, the concurrence of the legatee; for, after the executor's assent to the bequest, the legal title vests in the legatee, at whose suit an action of ejectment will lie against the purchaser (*z*).

But it is to be noticed, that leases by executors or administrators, though good at law, are voidable in equity unless shown by the lessees to be a due administration of the assets of the testator or intestate (*a*). Thus, an underlease granted by an administratrix was set aside, the lessee having notice that a sale was required by the parties beneficially interested (*b*). So, where a reversionary lease was granted by an executor, without noticing a fine paid by the lessee as a consideration for the grant, Sugden, C., set it aside as being an undue execution of the executor's authority, and tending to enable him to commit a fraud, by concealing from the cestuique trust the receipt of the fine (*c*). So, where a party bequeathed his leaseholds to trustees, whom he also appointed executors, upon trust for sale, the V. C. (*d*) dismissed a bill by them for a specific performance of a contract to take an underlease, observing, that, *primâ facie*, a trust for sale was inconsistent with the granting of a lease; but his Honor added that there might be circumstances to justify the executors in departing from the words of the trust; though, as the cestuis que trust were not parties to the suit, he could

(*y*) *Hachett v. Mc Namara*, Lloyd & Goo. Ca. temp. Plunket, C., 283. As to the effect of the covenant for renewal by an administrator, see next page.

(*z*) *Paramour v. Yardley*, Plowd. 539. 4 Co. 28, b. *Young v. Holmes*, 1 Stra. 70. *Saunders's case*, 5 Co. 12, b. *Chamberlain v. Chamberlain*, 1 Ch. Ca.

256. *Doe dem. Lord Say and Sele v. Guy*, 3 East, 120.

(*a*) *Drohan v. Drohan*, 1 Ball & B. 185. *Keating v. Keating*, Lloyd & Goo. Ca. temp. Sugden, C., 133.

(*b*) *Drohan v. Drohan*, sup.

(*c*) *Keating v. Keating*, sup.

(*d*) *Sir L. Shadwell*.

not enter into the consideration of the particulars which might tend to show that they were justified (*e*).

In the case of *Magrave v. Archbold* (*f*), the House of Lords considered an underlease by an administratrix with a covenant for renewal as often as she obtained a renewal from the head landlord too improvident to be supported. But in a later case (*g*), where an administratrix being possessed in right of her intestate of leasehold property, with a toties quoties covenant for renewal, underlet it at an increased rent, with a covenant for renewal on obtaining a renewal from the superior lessor, and it was proved that the premises were useful only for building ground, and that the underlease was not made at an undervalue, the court upheld the lease, the property being of such a description that it could not be beneficially used without giving to the lessee an interest which would make it safe for him to build on the premises.

XIII.—*Guardians.*

The distinctions taken in this division will scarcely be intelligible without a few introductory remarks on the different kinds of guardians. For our purposes, then, guardians may be ranged in six classes:—1st, guardians by nature; 2ndly, guardians by nurture; 3rdly, guardians in socage; 4thly, testamentary guardians; 5thly, guardians by election; and 6thly, guardians by the appointment of the Lord Chancellor. As their powers of leasing their wards' lands vary according to the kind of guardianship, I shall briefly notice the leading characteristic of each class (*h*).

1st. Guardianship by nature belongs to the father, and in some cases to the mother, of the child (*i*), until its age of

(*e*) *Evans v. Jackson*, 8 Sim. 217.

(*f*) *Magrave v. Archbold*, 1 Dow, P. C. 107.

(*g*) *Hachett v. McNamara*, Lloyd & Goo. Ca. temp. Phunket, C., 283.

(*h*) See, on the subject of guardian-

ship, notes by Hargreaves to Co. Lit. 88, b. 89, a. 1 Thomas's Co. Lit. 151, *et seq.* 3 Salk. 176; and 1 Fonbl. Tr. Eq. 225, 5th Ed.

(*i*) 1 Bla. Com. 461.

twenty-one (*k*); but, extending no further than to the custody of the infant's person (*l*), confers no power of leasing his lands for a fixed term, though a lease at will may perhaps be supported (*m*).

In the case of *Smith v. Low* (*n*), however, which arose in a court of equity, a mother, acting as guardian of her six infant children, who were owners of certain estates devised to them by their father, demised the premises on a building lease for forty-one years. Her eldest son, who was about nineteen years of age, joined with her in the lease, and covenanted that the lessee should have quiet enjoyment, and that the rest of the children, when of age, should confirm the lease. The children all arrived at age, and accepted the rent for above ten years after the youngest came of age. After such acceptance, they brought their ejectment against the lessee, who filed his bill to have the lease established. And the chief question was, whether the lease ought to be established in equity under the circumstances of the case. "It appears (said Lord Hardwicke) to be for a valuable consideration, rent reserved, and covenants for the lessee to leave it in good repair, and it is mentioned by the mother, who acts as guardian, to be for the benefit of the infants; there is no fraud or collusion proved in the lessee; and the husband of the lessor, and father of the infants, died in bad circumstances, unable to repair the premises, which were houses and a mill; therefore the consideration of the lessee's repairing them is a beneficial one for the infants, and that is sworn to be done: here the great point is the acceptance of rent for so long a continuance, the youngest child having been of age ten years, and notice of the lease must be presumed." The lease was, therefore, decreed to be established for the residue of the term, and, as it was against conscience to bring ejectments after these transactions, the lessee was decreed his costs at law and in equity.

(*k*) *Rex v. Thorp*, Carth. 334-6; S. C. 5 Mod. 221.

(*l*) *Ibid.* *Rex v. The Inhabitants of Sherrington*, 3 Barn. & Adol. 714.

(*m*) *Pigot v. Garnish*, Cro. Eliz. 678. 734.

(*n*) *Smith v. Low*, 1 Atk. 489.

2ndly. Guardianship for nurture belongs also to the father, or mother where there is no testamentary guardian (*o*), until the infant, whether male or female, attains the age of fourteen (*p*); and, like guardianship by nature, is confined to the government and custody of the infant's person (*q*); but it is said that the guardian may lease at will (*r*).

3rdly. Guardianship in socage is a consequence of tenure, occurring only when the minor is entitled to a legal estate by descent in lands holden by socage (*s*), and devolves, by the common law, on the next of kin to whom the inheritance cannot descend (*t*). The office confers not a bare authority only, but an interest in the lands descended, and constitutes the guardian a *quasi dominus pro tempore* (*u*). But his power determines when the infant, whether male or female, attains the age of fourteen (*x*); and may be totally suspended by the father's exercising his privilege of appointing a guardian by will under the statute of 12 Car. 2 (*y*).

With regard to his power of leasing, it is laid down, in general terms, by a case, which, considering the name of the reporter (*z*), would seem to be entitled to some degree of weight, that a guardian in socage cannot make a lease of the infant's lands. The importance of that case will be a sufficient apology for my introducing it here at length, particularly as I propose a comparison between it and the earlier and later determinations and dicta. The question, it is true,

(*o*) Roach v. Garvan, 1 Ves. 158.

(*p*) 1 Bla. Com. 461. 3 Co. 38, b.

(*q*) 8 E. 4. 7, [B]. pl. 2. Bro. Ab. Garde, pl. 70.

(*r*) Pigot v. Garnish, Cro. Eliz. 678. 734.

(*s*) Quadring v. Downs, 2 Mod. 176-7. Rex v. The Inhabitants of Toddington, 1 Barn. & Ald. 560-4-5. Rex v. The Inhabitants of Sherrington, 3 Barn. & Adol. 714.

(*t*) 1 Bla. Com. 461. 2 Bla. Com. 33. Lit. s. 123. Co. Lit. 87, b.

(*u*) Co. Lit. 87, b. Hutt. 16, 17.

Cro. Jac. 99. Rex v. The Inhabitants of Oakley, 10 East, 494. Eyre v. Countess of Shaftsbury, 2 P. Wms. 108. Rex v. The Inhabitants of Sherrington, sup. Rex v. Manners, 3 Adol. & Ell. 597; S. C. 5 Nev. & Man. 353.

(*c*) 1 Bla. Com. 462. 2 Bla. Com. 83. Lit. s. 123. 3 Atk. 624. 1 Ves. 91. Doe dem. Rigge v. Bell, 5 Term Rep. 471.

(*y*) 12 Car. 2. c. 24.

(*z*) Roe dem. Parry v. Hodgson, 2 Wils. 129. 135.

arose on a lease made by a testamentary guardian; but the court admitted that that circumstance was immaterial (*a*).

The principal question was, whether a lease for twenty-one years made by the testamentary guardians of an infant, Mr. Spencer, to Parry, was absolutely void, or only voidable. It appeared that Mr. Spencer himself had done no one act since he came of age either towards establishing the lease, supposing it voidable, or to avoid it. Upon the first argument, the court agreed in one point, viz., that a testamentary guardian by statute till an infant was twenty-one years of age, and a guardian in socage till an infant was fourteen, were the same; and, therefore, whatever interest the latter had in lands till the infant was fourteen, the guardian by the statute had the same till he was twenty-one. But, as to the main question, whether the lease was void, or only voidable, they all, except Noel, J., doubted much, and gave no opinion. The Chief Justice seemed inclined to think the lease was void, from what he said. Clive, J., said, he was far from saying it was either void or voidable. Bathurst, J., gave no opinion; but from what he said, he seemed to think that, whether the lease was void or not at first, it certainly became void or at an end when Mr. Spencer came of age; so could not be then a subsisting lease to give the lessor of the plaintiff title. Noel, J., was of opinion, that the lease was a good lease, and only voidable by the infant when he came of age; and that he might then affirm it, if he thought fit; but said, that he should be very willing and ready to depart from this opinion, if he should find he had come into it too readily. *Utterius concilium*. The court were afterwards of opinion that the guardian of an infant could not make a lease of the infant's lands, and that the lease in this case was absolutely void.

Had this decision been expressly referred to the particular circumstances of the case, it might have been reconciled with the preceding and succeeding authorities; but, unaccompanied

(*a*) And see *Bedell v. Constable*, Vaugh. 179. *The Duke of Beaufort v. Berty*, 1 P. Wins. 703-4.

by explanation or qualification, it stands an isolated and anomalous case, and must be adopted in practice with much caution. The circumstance of the opinion of the court being given after mature deliberation renders the case the more dangerous.

We may now advert to the earlier cases, all of which, with one insignificant exception (*b*), admit the right of a guardian in socage to demise his ward's lands.

In the first, decided in the early part of Queen Elizabeth's reign, and reported by an authority of the highest eminence (*c*), a woman, guardian in socage, joined with her after-taken husband in a lease of the infant's land; but although it was declared, upon a principle of law which I have endeavoured to explain elsewhere (*d*), that she was not bound by the demise after her husband's death, no attempt was made, even in argument, to invalidate it on the ground of the guardian's incapacity to lease at all.

To the like effect are other cases, decided in the thirty-first year of the same reign (*e*), where a tenant in socage leased his lands for four years, and died, his heir within the age of eight years; and the mother, being guardian in socage, leased the land by indenture to the same lessee for fourteen years: and it was holden, that the first lease was extinguished; which clearly admitted the power to demise; for it is well known that an interest in a lessee cannot be extinguished unless there be an accession of a new interest incompatible with the former: in other words, in transactions between subject and subject (*f*), if the new estate proposed to be created fail of effect, the one previously existing is not determined (*g*).

(*b*) Clayt. 112. pl. 192.

(*c*) Osborn *v.* Carden, Plowd. 293.

(*d*) Ante, p. 138, *et seq.*, as to leases by husband and wife.

(*e*) Anon. 1 Leon. 158, case 226. Willis *v.* Whitewood, 1 Leon. 322; S. C. Ow. 45; cited, nom. Mills *v.* Whitewood, Hob. 105. Willet *v.* Wilkinson, semb. S. C., 4 Leon. 7. Bac. Ab. Leases,

(1) 9. Brisden *v.* Hussey, Rol. Ab. Garde, (Q) pl. 4.

(*f*) It may be otherwise on a new lease granted by the crown. See ante, p. 231-2.

(*g*) Wilson *v.* Sewell, 4 Burr. 1975; S. C. 1 W. Blac. 617. Zouch dem. Abbot *v.* Parsons, 3 Burr. 1307.

The point again arose, incidentally, in the reign of King James the First (*h*), where it was clearly held by Gawdy, C. J., and Warburton and Daniel, Js., against the opinion of Walmesley, J., that a guardian in socage, being *dominus pro tempore*, and having an interest in the land, might let it for years (*i*), and might avow in his own name and right (*k*); and that his lessee might have an *ejectione firmæ* (*l*).

And to the same effect is *Bedell v. Constable* (*m*).

Next, in order of time, (8 W. 3.) came the case of *Wade v. Baker* (*n*), where the court decided, that a guardian in socage might bring trespass or ejectment in his own name, and make leases of the land in his own name until the infant should come to the age of fourteen.

Up to this time, therefore, the current of authority uniformly recognised the guardian's power of demising; but after an interval rather exceeding half a century appeared the judgment above noticed (*o*) in *Roe dem. Parry v. Hodgson*, in which, supposing the report to be correct, a doctrine was advanced in subversion of the previously received opinion; though it is to be lamented that the profession were not favored with the reasons on which that doctrine was founded.

The case, however, was never acquiesced in as an authority that a guardian could not make any lease of the infant's lands; for we find a case in Ireland about twenty-eight years afterwards (*p*), determining that he might make a demise to subsist during the infant's minority. The court, evidently unwilling to grapple with the case of *Roe v. Parry*, eluded the difficulty by distinguishing it from the one before them, on the ground of the former being for a term of years which

(*h*) *Shopland v. Rydler*, or *Shoplane v. Roydler*, Cro. Jac. 55. 93; S. C., nom. *Shopland v. Radlen*, Ow. 115. And see *Dugar v. Norton*, 1 Freem. 102. 2 P. Wms. 122.

(*i*) As in Plowd. 293; the page is 299 in Cro. Jac., by mistake.

(*k*) Keilw. 46, b. 15 H. 7. 13. 1. [B].

(*l*) Hutt. 16.

(*m*) *Bedell v. Constable*, Vaugh. 182.

(*n*) *Wade v. Baker*, 1 Ld. Raym. 130.

(*o*) Ante, p. 373-4.

(*p*) *Shaw v. Shaw*, Vern. & Scriv. 607.

exceeded in duration the minority of the ward. Still *Shaw v. Shaw* is sufficient for our purpose, as it shows the opinion of the court with regard to the guardian's perfect competency to lease.

And in a more modern case, also in the King's Bench (*g*), decided in full court, Lord Ellenborough, C. J., and Justices Grose, Le Blanc, and Bayley, said, that there was no doubt of the right of the guardian in socage during the guardianship either to lease or occupy the estate. And to the same effect is a later dictum of Mr. Justice Holroyd, who said (*r*), that a guardian in socage might demise, and that a lease by him might be so pleaded, although the term moved out of the seisin of the infant; words which require no comment.

The last decision on the point occurred in the case of *Rex v. Sutton* (*s*), where the Court of King's Bench, on the authority of *Wade v. Baker* (*t*), declared that a guardian in socage might make a lease of the infant's lands until his age of fourteen.

Thus stand the cases on this important question; upon a balance of which, I apprehend that the general expression in Wilson's report "that a guardian cannot make a lease of the infant's land," must yield to the preponderating authority in the other scale, or be read with very considerable qualification.

Assuming the power of the guardian to demise, it remains to ascertain to what extent that power may be exercised. Although the greater number of the cases already quoted do not specifically mention the necessity of confining the term granted to the duration of the infant's minority, yet we may perhaps infer that such an impression existed at an early date, from the case of *Osborn v. Carden* (*u*), where particular care seems to have been taken to restrict the term to that period, the infant being of the age of five years and a half, and the

(*g*) *Rex v. The Inhabitants of Oakley*, 10 East, 491. 494.

(*r*) In *Hill v. Saunders*, 4 Barn. & Cres. 536.

(*s*) *Rex v. Sutton*, 3 Adol. & Ell. 597. 613; S. C. 5 Nev. & Man. 393.

(*t*) Sup. p. 376.

(*u*) Plowd. 293.

lease, dated in June, being made for eight years from the next ensuing Michaelmas, about which time the ward would nearly attain his age of fourteen; and the case of *Bedell v. Constable* (*x*) leads to the same conclusion. But, if that inference be untenable, later authority sets the question at rest. Besides the determination in *Wade v. Baker* (*y*), supported by *Rex v. Sutton* (*z*), we have the comparatively recent case of *Shaw v. Shaw*, before referred to (*a*), where Rebecca Shaw, by indenture, as guardian to her children, Judith and Rebecca Shaw, of the one part, and Richard Shaw (the defendant) of the other part, demised to Richard, "for and during the term, time, and space of the minority of Judith and Rebecca;" and the court, distinguishing the case from *Parry v. Hodgson*, held, that the guardian could make a lease of the minor's land to subsist during the minority.

The death of the infant, without doubt, would determine the lease.

It was said in *Balder v. Blackburn* (*b*), that a lease by a guardian in socage is determined by his death.

4thly. As to a testamentary guardian. The statute of 12 Car. 2 (*c*), which abolished guardianship in chivalry, and converted almost all the English tenures into tenures in socage, empowered (*d*) the father of any child or children under the age of one-and-twenty years, and not married at the time of his death, by deed or will, executed in the presence of two or more credible witnesses, to dispose of the custody and tuition of such child or children, for such time as he or they should remain under twenty-one, or for any lesser time, to any person or persons in possession or remainder, other than popish recusants.

And by the same act (*e*), the guardian was empowered to take into his custody, to the use of such child or children,

(*x*) Vaugh. 182.

(*y*) 1 Ld. Raym. 130, sup. p. 376.

(*z*) 3 Adol. & Ell. 597; S. C. 5 Nev. & Man. 353, sup. p. 377.

(*a*) Sup. p. 376.

(*b*) *Balder v. Blackburn*, Brownl. 79.

(*c*) 12 Car. 2. c. 24.

(*d*) Sect. 3. The Irish Act of 14 & 15 Car. 2., has a corresponding provision; ss. 6 and 7.

(*e*) Sect. 9.

the profits of all lands, tenements, and hereditaments, of such child or children, and also the custody, tuition, and management, of the goods chattels and personal estate of such child or children, till their respective age of one-and-twenty years, or any lesser time, according to such disposition therein aforesaid, and to bring such action or actions in relation thereunto, as by law a guardian in socage might do.

The act, however (*f*), does not affect the custom of the city of London, nor of any other city or town corporate, or of the town of Berwick-upon-Tweed, concerning orphans.

The consequence is, that all the powers which were vested in guardian in socage till the infant's age of fourteen, are now exerciseable by the testamentary guardian, the period of minority being extended from the age of fourteen to that of twenty-one years (*g*).

5thly. Guardianship by election arises (so far as our subject is concerned) when the infant, being seised of lands holden in socage, has attained his age of fourteen, at which time guardianship in socage ceases, and, being unprovided with a guardian by his father's will, elects some person to fill that office till he attains twenty-one. And this he is capable of doing notwithstanding his infancy (*h*). This species of guardianship is of the same nature, and has the same office and employment assigned to it by law, without any intervention or direction of the infant himself, as guardianship in socage (*i*), including, it should seem, a like power of demising the ward's estate, the period of minority existing till his age of twenty-one.

6thly. Guardianship by appointment of the Lord Chancellor is of common occurrence (*j*), though by what right the

(*f*) Sect. 10.

(*g*) *Bedell v. Constable*, Vaugh. 179.
Roe dem. Parry v. Hodgson, 2 Wils.
 129. *Shaw v. Shaw*, Vern. & Scriv.
 606.

(*h*) 1 Bla. Com. 462. Co. Lit. 87, b.

3 Atk. 624. 1 Ves. 91.

(*i*) *Bacon on Leases*, p. 138. 3 Atk.
 704.

(*j*) 2 Bla. Com. 88. *Roach v. Gar-*
van, 1 Ves. 159.

jurisdiction was originally assumed is not clearly ascertained (*k*). A guardian so appointed is in the nature of a receiver (*l*); and, it seems, cannot grant leases without the sanction of the court (*n*).

A question still remains, whether a lease made for a term which must necessarily exceed the infant's minority is absolutely void *ab initio*; or valid for the time of minority, and void for the excess; or valid for the minority, and voidable for the excess by the ward on his attaining his majority. The court in *Doe dem. Parry v. Hodgson* (*n*) were apparently of opinion that the lease was absolutely void, whether for the whole term, or for the excess only, is not clear, the looseness of the report admitting of either construction; but a work to which the profession have unanimously deferred as one of the highest credit (*o*), maintains, that such lease seems not to be absolutely void by the infant's coming of age, but only voidable by him if he thinks fit; for, according to the same work, it is not derived barely out of the interest of the guardian, or to be measured thereby (*p*), but takes effect also by virtue of his authority, which for the time is general and absolute; and, therefore, all lawful acts done during the continuance of that authority are good, and may subsist after the authority itself by which they were done is determined, and, consequently, the infant when he comes of age, may by acceptance of rent, or other act, if he thinks fit, make such lease good and unavoidable. It is difficult to determine which authority is entitled to greater weight, though Bacon's, probably, would be preferred to that of Wilson.

If there are two infants, I. and R., the lease may safely be granted "for and during the term of the minority of the said I. and R." An attempt was made to invalidate a lease

(*k*) See Hargr. note 16 to Co. Lit. 388, b.; and Macpherson on Infancy, p. 95.

(*l*) Per Patteson, J., in *Rex v. Sutton*, 3 Adol. & Ell. 597. 608; S. C. 5 Nev. & Man. 353.

(*n*) Macpherson on Infancy, p. 106.

(*o*) 2 Wils. 129. 135, sup. p. 373-4.

And see *Pigot v. Garnish*, Cro. Eliz. 678. 734.

(*o*) Bacon on Leases, p. 139. Bac. Ab. Leases, (1) 9.

(*p*) See also as to this Mr. Justice Holroyd's remark in *Hill v. Saunders*, 4 Barn. & Cres. 536. Ante, p. 377.

couched in these terms, which, it was argued, signified, until both of them the said I. and R. should attain twenty-one, and, consequently, would extend the term beyond the minority of the elder; but the court overruled the objection (*g*).

The various matters hitherto noticed in this division are totally independent of a late statute (*r*), by which, without abridging the then existing powers of guardians, additional facilities were afforded for leasing the estates of infants, with greater security to the lessees. As this act has been fully noticed in treating of leases by infants (*s*), it will be unnecessary to repeat its provisions in this place.

Unless the lease be made in pursuance of this statute, the name of the guardian should be used, and not that of the infant as if the authority were derived from him (*t*); for in that case the deed would be void, as an infant cannot appoint an attorney to pass an estate (*u*).

But if it be desirable to continue the lease beyond the period of infancy, the infant himself, as well as his guardian, should be a demising party, as he may afterwards, on attaining twenty-one, confirm the lessee's interest, an infant's lease, as we have seen (*x*), being voidable only, and not void.

Until lately, to enable the infant to bring an action on the covenants, he must have been a party to the deed; and, therefore, in a late case, where by an indenture of lease between I. and C. Drummond of the first part, an infant's guardian of the second part, and the lessee of the third part, the rent was reserved to the infant, and the covenants were entered into with the infant and I. and C. Drummond, it was held that an action of covenant, in which the infant was a co-plaintiff with I. Drummond (who survived C. Drummond), could not be maintained (*y*); but by a recent act of parlia-

(*g*) *Shaw v. Shaw*, Vern. & Scriv. 607.

(*r*) 11 Geo. 4 & 1 W. 4. c. 65. s. 17.

(*s*) Ante, p. 34, *et seq.*

(*t*) Bacon on Leases, p. 138. Bac. Ab. Leases, (I) 9.

(*u*) Perk. s. 139. *Combes's case*, 9 Co. 76, b.

(*x*) Ante, p. 30, *et seq.*

(*y*) *Lord Southampton v. Brown*, 6 Barn. & Cres. 718.

ment (*z*) it is enacted (*a*), that under an indenture executed after the 1st of October, 1845, the benefit of a covenant respecting any tenements or hereditaments may be taken, although the taker thereof be not named a party to the same indenture. It will be remembered that this act has no effect on leases executed before the day named.

If the guardian take a bond in his own name for arrears of rent due from the tenants, he makes the debt his own (*b*).

XIV.—*Assignees of Bankrupts.*

As all a bankrupt's estate, and all powers vested in him which he might legally execute for his own benefit, (except the right of nomination to any vacant ecclesiastical benefice,) may be executed by the assignees for the benefit of the creditors, as the bankrupt might have executed the same (*c*), it follows that they may exercise powers of leasing vested in the bankrupt; but with regard to his *estate*, as distinguished from his *power*, their duty is to sell, and not to lease. An appointment by the bankrupt in the interval between the act of bankruptcy and the adjudication is void (*d*), provided the fiat issue within due time (*e*).

XV.—*Assignees of Insolvents.*

The act of 1 & 2 Vict. (*f*), for the relief of insolvent debtors, provided (*g*), that all powers vested in any such prisoner whose estate should by an order thereunder have been vested in the provisional assignee which such prisoner might legally execute for his own benefit, (except the right of nomination to any

(*z*) 8 & 9 Vict. c. 106.

(*a*) Sect. 5.

(*b*) Wall v. Buckley, Rep. in Ch. 97.

(*c*) 6 Geo. 4. c. 16. s. 77.

(*d*) Doe dem. Coleman v. Britain, 2

Barn. & Ald. 93.

(*e*) See ss. 81 and 86 of 6 Geo. 4. c. 16.

(*f*) 1 & 2 Vict. c. 110.

(*g*) Sect. 49.

vacant ecclesiastical benefice,) should be vested in the assignee or assignees of the real and personal estate of such prisoner by virtue of the act, to be by such assignee or assignees executed for the benefit of all and every the creditors of such prisoner under the act, in such manner as such prisoner might have executed the same.

And, in like manner, powers vested in any petitioner for protection from process under the acts of 5 & 6 Vict. c. 116 (*h*), and 7 & 8 Vict. c. 96 (*i*), are by the latter act (*k*) vested in his assignees, to be executed for the benefit of his creditors, as the petitioner might have executed the same.

Independently, however, of such powers, the duty of the assignees is, as in cases of bankruptcy, to sell, and not to lease, the insolvent's property.

In the case of *Partington v. Woodcock* (*l*), to a declaration in an action of debt for rent, the defendant pleaded that before the demise the plaintiff took the benefit of the insolvent debtors' act, and that all his estate, right, &c., in the premises became vested in the assignee, and that after the plaintiff had been discharged, and after the making of the demise in the declaration mentioned, (the plaintiff having been authorised and permitted by the assignee, and by permission of the court after the adjudication and discharge, to remain in the possession and management of the premises, and the plaintiff having been also authorised and permitted by the said assignee, and by the permission of the said court, to make the said demise of the said premises to the said defendant,) and before the rent became payable, and before the commencement of the suit, the defendant received from the assignee a notice and requisition to pay the rent to him, and that, in default thereof, legal proceedings would be taken by the assignee against the defendant to recover such rent; by reason whereof the

(*h*) 5 & 6 Vict. c. 116, an act for the relief of insolvent debtors.

(*i*) 7 & 8 Vict. c. 96, for amending the law of insolvency, bankruptcy, and execution.

(*k*) Sect. 11.

(*l*) *Partington v. Woodcock*, 6 Adol. & Ell. 690; S. C. 5 Nev. & Man. 672; 1 Har. & Wol. 262.

defendant became liable to pay the amount to the assignee. And, on demurrer, it was held that the plea could not be maintained, as it was not shown how the old tenancy was determined, and a new one between the assignee and defendant created. The defendant had leave to amend. Patteson, J., said: "The plea here states that the assignee gave the defendant notice to pay him all the rent that should accrue in respect of the said demised premises, and under and by virtue of the said demise, in the declaration mentioned, thus treating the previously mentioned demise by the plaintiff as still subsisting. Now, if that demise was made by the insolvent in his own name, I do not see how the assignee could come in as landlord, except by putting an end to the demise, and commencing a new tenancy. I do not see how the rent claimed by the assignee could be rent claimed under 'the said demise.' Unless the previous demise is put an end to, you make the assignee or mortgagee constructively party to a demise between others" (*m*).

XVI.—*Committees of Lunatics.*

For the law on this branch of our subject the reader is referred to a previous part of the work (*n*) where the subject has been noticed.

XVII.—*Lords of Manors, as to Wastes.*

A custom for the lord of a manor to grant leases of the waste without restriction cannot be supported, as it would enable him to annihilate the right of common altogether (*o*). But by 13 Geo. 3. c. 81 (*p*), lords of manors were empowered (*q*)

(*n*) See further on this point, ante, p. 165; *Leases by Mortgagor and Mortgagee*.

(*n*) Ante, p. 37.

(*o*) *Badger v. Ford*, 3 Barn. & Ald. 153. And see *Arlett v. Ellis*, 7 Barn. & Cres. 346.

(*p*) 13 Geo. 3. c. 81, entitled "An Act for the better cultivation, improvement, and regulation, of the common arable fields, wastes, and commons of pasture, in this kingdom."

(*q*) Sect. 14.

with the consent of three-fourths of the persons having right of common upon the waste and commons, to demise or lease, for any term or number of years not exceeding four years, any part of such wastes and commons not exceeding a twelfth part thereof, for the best and most improved yearly rent that could by public auction be got for the same; and it was enacted (*r*) that the clear net rents reserved by any such lease or leases should be applied in the draining, fencing, or otherwise improving, of the residue of such wastes and commons.

XVIII.—*The Allotment Wardens.*

A recent act of parliament (*s*) for facilitating the inclosure and improvement of commons and lands held in common, has provided (*t*), that the allotment which upon any inclosure under its provisions (*u*) shall be made for the labouring poor shall be under the management of the incumbent of the parish or ecclesiastical district in which such allotment shall be situate, or the officiating minister for the time being nominated by the incumbent for that purpose, the churchwarden, if there be but one, or if there be more than one, one of the churchwardens for the time being of such parish, and two other persons who shall be rated to the relief of the poor in such parish; and that such churchwarden, where there is more than one churchwarden, shall be yearly named, and that such two other persons shall be yearly chosen and appointed, at the same time, and by the same persons, and in the same manner, as the overseers of the poor for such parish shall be chosen and appointed, and shall continue in office in like manner until the next appointment of overseers, or until others are named and chosen and appointed in their stead; and that such incumbent or officiating minister, churchwarden, and two other persons, for the time being, shall be styled "The Allotment Wardens" of the parish, and shall

(*r*) Same section.

(*t*) Sect. 108.

(*s*) 8 & 9 Vict. c. 118.

(*u*) See sect. 31.

manage and let the said allotment as after provided; and that all things by the act authorised to be done by the allotment wardens may be done by any two of them; and that, in the event of the death or retirement from office of any one or more of them, the surviving or continuing wardens may act as if no such vacancy had happened.

And also (*x*), that the allotment wardens shall from time to time let the allotment under their management in gardens not exceeding a quarter of an acre each to such poor inhabitants of the parish for one year, or from year to year, at such rents, payable at such times, and on such terms and conditions, not inconsistent with the provisions of the act, as they shall think fit: provided always, that the commissioners (*y*) may frame such regulations, not inconsistent with the provisions of the act, for the letting of such allotments as therein aforesaid, as they may think advisable, and that such regulations shall be obligatory on the allotment wardens during five years from the date thereof, or during such shorter period as the commissioners shall direct: provided also, that the gardens so to be let shall be let free of all tithe or tithe rent-charge (if any), rates, taxes, and assessments whatsoever; and shall before the first letting thereof, and once at least in every ten years after such first letting, be valued by a competent person to be appointed by the allotment wardens for that purpose, who shall estimate the full rent which the same would be worth to be let by the year for farming purposes, all tithes, or tithe rent-charge, rates, taxes, and assessments, being borne by the landlord, and shall verify such valuation by solemn declaration under the statute; and that the rent at which the same gardens respectively shall be let shall be not below the full yearly value of the land according to the last of such valuations; and that the allotment wardens shall, for the purposes of all rates and taxes, be deemed the occupiers of such allotment, and shall pay all rates and taxes,

(*x*) Sect. 109.

(*y*) Styled "The Inclosure Commis-

sioners for England and Wales."

Sect. 2.

tithes, and tithe rent-charge (if any), in respect thereof: provided always, that no building whatsoever shall, under any such letting, or otherwise, on any pretence, be erected for or used as a dwelling on any such garden, or on any part of any such allotment; and that in case any such building shall be erected or used contrary thereto, the allotment wardens shall forthwith pull down the same, and sell and dispose of the materials thereof; and that the produce of such sale shall be applicable in like manner as the rents of such gardens.

And further (z), that if the rent reserved upon the letting of any garden by the allotment wardens shall at any time be in arrear for forty days, or if at any time during the tenancy, being not less than three calendar months after the commencement thereof, it shall appear to the allotment wardens that the occupier of such garden shall not have duly observed the terms and conditions of his tenancy, or shall have gone to reside more than one mile out of the parish, then they shall serve a notice upon such occupier, or, in case he shall have gone to reside out of the parish, shall affix the same to the door of the church of the parish, determining the tenancy at the expiration of one month after such notice shall have been so served or affixed; and it is declared that thereupon such tenancy shall be determined accordingly: provided always, that in every such case the allotment wardens, or their incoming tenant, shall pay to the occupier whose tenancy shall have been so determined a fair recompense in money for any crops (not being crops prohibited by the terms of such tenancy) which may be growing on such garden at the time of such determination, and for any manure left on such garden, or any benefit accruing from the manuring of such garden to the wardens or their incoming tenant; and that the justices to whom application may be made for a warrant to give possession of such garden shall settle the amount of such recompense, in case the parties differ about the same, and stay the execution of such warrant until the

same shall have been paid or tendered, or, in case such occupier be absent, until the payment thereof shall have been secured to the satisfaction of such justices.

It is also enacted (*a*), that in case, upon the determination of any such tenancy as therein aforesaid, the occupier of any such garden shall refuse to quit and deliver up possession thereof, or if any other person shall unlawfully enter upon, take, or hold possession of, any such garden, or of any part of such allotment, the allotment wardens may recover possession according to the mode prescribed by the act of 1 & 2 Vict. c. 74 (*b*), in such and the same manner as if the same wardens were landlords or a landlord, and as if such overholding occupier or other person were a tenant neglecting or refusing to quit and deliver up possession, within the meaning of that act.

And moreover (*c*), that all rents payable in respect of the allotment under the management of the allotment wardens shall be payable to such wardens, who shall have the same remedies for recovery thereof by distress and otherwise as if the legal estate of and in such allotment were vested in them under the act [*i.e.*, of 8 & 9 Vict. c. 118]; and that such rents shall be applicable, in the first place, to the payment of all rates, taxes, tithes, tithe rent-charge, and of the rent-charge charged on such allotment under its provisions, and of all expenses incurred by the allotment wardens in the execution of their trusts and powers under it; and that the residue, if any, of such rents shall be paid to the overseers of the poor, in aid of the poor rates of the parish, and be applicable in the same manner as, and subject to all the provisions concerning, the moneys assessed for the relief of the poor.

(*a*) Sect. 111.

(*b*) 1 & 2 Vict. c. 74, entitled "An Act to facilitate the recovery of possession of tenements after due deter-

mination of the tenancy," noticed in the Seventh Part of this Work.

(*c*) Sect. 112.

XIX.—*Receivers.*

A receiver in Chancery may make a lease under the direction of the court, but not otherwise (*d*); and may distrain in his own name for the rent reserved to him (*e*). Of course he must obtain the most advantageous terms (*f*). It is the present practice (*g*), in every order directing the appointment of a receiver of a landed estate, to insert a direction, that such receiver shall manage, as well as set and let, with the approbation of the Master; and in acting under such an order it is not necessary to present a petition to the court in the first instance; but the Master, without special order, will receive any proposal for the management or letting of the estate for the parties interested, and will make his report thereon, which report, however, must be submitted to the court for confirmation in the same manner as was formerly done with respect to reports on such matters made upon special reference; and until such report be confirmed, it will not give any authority to the receiver. In a case (*h*) where there was an infant remainder-man, the court refused an application, at the instance of the receiver in the cause, (a creditors' suit,) for a reference to the Master to inquire whether it would be for the benefit of the parties interested in the suit that the receiver should let the premises; the object in fact being to enable the receiver to make leases to bind the infant remainder-man: the Vice-Chancellor said that he recollected no instance in which the court had assumed such a jurisdiction.

(*d*) *Morris v. Elme*, 1 Ves. jun. 139. *Durnford v. Lane*, 24 Jan. 1806, cited, 2 Madd. Ch. Pr. 244. *Cooke v. Cooke*, 2 Mol. 371.

(*e*) *Dancer v. Hastings*, 4 Bing. 2; S. C. 12 Mo. 34. And see further, as to distresses by receivers, *Griffith v. Griffith*, 2 Ves. 401. *Pitt v. Snowden*, 3 Atk. 750. 5 Burr. 2698. *Hughes v. Hughes*, 1 Ves. jun. 161; S. C. 3 Bro. C. C. 87. *Bennett v. Robins*, 5

Car. & Pa. 379. *Shelly v. Pelham*, 1 Dick. 120. *Mitchel v. Duke of Manchester*, 2 Dick. 787. *Brandon v. Brandon*, 5 Madd. 473. *Ward v. Shaw*, 9 Bing. 608; S. C. 2 Mo. & Sc. 756.

(*f*) *Wynne v. Lord Newborough*, 1 Ves. jun. 164; S. C. 3 Bro. C. C. 88.

(*g*) No. 54 of Orders in Chancery, of 3 April, 1823 (9 Geo. 4).

(*h*) *Gibbins v. Howell*, 3 Madd. 469.

When the estates lie in India, it is the usual course to appoint some person in this country to be receiver, and for him to appoint his own agent in India; and, to prevent the necessity of applying from time to time for permission to let, the Master must inquire what should be the term beyond which the receiver should not be permitted to let (*i*).

If a receiver be appointed, and the owner of the estate be in possession of part of the premises, application should be made to the Master that the owner be ordered to deliver possession to the receiver (*k*). Without application, the receiver cannot in any case turn out the tenants, nor raise their rents upon slight grounds (*l*).

xx.—*Bailiffs*.

A mere bailiff cannot lease his employer's lands otherwise than at will (*m*); but a power may be conferred on him for the purpose.

xxi.—*Agents*.

An agreement for a lease made with an agent who acts under a power of attorney, and a lease executed by such agent in pursuance of the agreement will effectually bind the principal (*n*). But if a party dealing with an agent for a lease, and having full knowledge that the principal intends the ground to be let for building only, take an agreement which does not contain a covenant to build, nor a single stipulation with regard to building, he cannot enforce a specific performance of such agreement against the principal (*o*).

(*i*) — *v. Lindsey*, 15 Ves. 91.

(*k*) *Griffith v. Griffith*, 2 Ves. 401.

(*l*) *Wynne v. Lord Newborough*, 1 Ves. jun. 164; S. C. 3 Bro. C. C. 83.

(*m*) *Shopland v. Rydler*, or *Roydler*, Cro. Jac. 55, 93; S. C., nom. *Shopland v. Radler*, Ow. 115. *Gylson*, or *Gylbe*, *v. Searls*, Cro. Jac. 34-5, 176-8.

Anon. Mo. 70, pl. 191. *Anon.* Hutt. 16. *Knipe v. Palmer*, 2 Wils. 16.

(*n*) *Hamilton v. Clanricarde*, 5 Bro. P. C. 547; Toml. ed. vol. 1, p. 341; Jour. vol. 30, p. 193.

(*o*) *Helslam v. Langley*, 1 Yo. & Col. V. C. 175.

If a person, at the time of entering into an agreement for a lease, be acting as the agent of another in negotiating for the lease, it is not material whether at that moment he intends the agreement to be for the benefit of his principal or his own; because in either case the principal will be entitled, as against him, to the benefit of the contract (*p*).

Where an agent had an authority to grant leases from three only of four tenants in common, and he granted a lease to the land-steward of the property demised, professedly by virtue of a power granted to him by the four, the court decreed it to be set aside (*q*).

In dealing with an agent, the agreement or lease should be made as the instrument of the principal, his name should be used as the granting party, and the deed delivered as his lease (*r*). Nor is an agent of the crown distinguishable in this respect from an agent of a subject (*s*); nor a parol contract from an instrument under seal (*t*). By neglecting this caution the agent may render himself personally responsible for the fulfilment of the contract, or performance of the covenants contained in the lease, although he expressly describe himself as an agent for another (*u*).

If a tenant take possession under an instrument professing to be a lease made in the agent's name, he may be evicted

(*p*) *Taylor v. Salmon*, 4 Myl. & Cr. 134. *Lees v. Nuttall*, 1 Russ. & Myl. 53; affirmed by Lord Brougham, on appeal, 2 Myl. & K. 819.

(*q*) *Rossiter v. Walsh*, 2 Con. & Law. 563; S. C. 4 Dru. & War. 485.

(*r*) *Combes's case*, 9 Co. 77, a. *D'Abbridgecourt v. Ashley*, Mo. 318. *Reynold v. Kingman*, Cro. Eliz. 115. *Gilby v. Copley*, 3 Lev. 140. *Frontin v. Small*, 2 Stra. 705; S. C. 2 Ld. Raym. 1418. *Wilks v. Back*, 2 East, 142. *White v. Cuyler*, 6 Term Rep. 176-7; S. C. 1 Esp. 200. *Berkeley v. Hardy*, 5 Barn. & Cres. 355; S. C. 3 Dow. & Ry. 102.

(*s*) *Anon. Mo.* 70. pl. 191. As to leases by the crown, see ante, p. 184.

The commissioners of woods and forests contracting for leases of crown lands are expressly indemnified from personal liability by 10 Geo. 4. c. 50. s. 17. See ante, p. 199.

(*t*) *Norton v. Huron*, 1 Ry. & Moo. 229; S. C. 1 Car. & Pa. 648.

(*u*) *Ibid.* And see *Wilks v. Back*, 2 East, 142. *Appleton v. Binks*, 5 East, 143; S. C. 1 Smith, 361. *Burrell v. Jones*, 3 Barn. & Ald. 47. *Iveson v. Conington*, 1 Barn. & Cres. 160. *Berkeley v. Hardy*, 5 Barn. & Cres. 355; S. C. 3 Dow. & Ry. 102. *Cass v. Rudele*, 2 Vern. 280; S. C. 1 Eq. Ca. Ab. 25. pl. 8. *Kendray v. Hodgson*, 5 Esp. 228.

by the principal, the instrument being void as a lease (*x*); but, entering under colour of title, he holds in the interval as a tenant-at-will (*y*).

No particular form of expression is required, provided the act be performed in the name of the principal. However, the lease is usually made "between A. B. [the lessor], of &c., by C. D., of &c., his attorney for this purpose lawfully authorised, of the one part, and the lessee of the other part; and concludes thus: "In witness whereof the said [lessor], by the said C. D. his attorney, hath hereunto set his hand and seal &c.



A. B. [The Lessor]

by

C. D. [The Attorney]"

The power does not admit of delegation: *Delegatus non potest delegare* (*z*).

It is apprehended that a lease made by, and in the name of, the agent, reserving rent to the principal, and executed by both agent and principal would not be binding on the latter, at law, except so far as he would be liable on the covenants entered into by him (*a*). On the other hand, if the instrument, being *inter partes*, the agent of the one part, and lessee of the other, purport to be a demise by the principal, and the rent be reserved to him, and the covenants be expressed to be between him and the lessee, but the deed be executed by the agent in his own name, and by the lessee only, the principal cannot support an action of covenant against the lessee (*b*), unless the indenture be executed after the 1st of October, 1845, in which case the benefit of a condition or covenant respecting any tenements or hereditaments may be taken, although the taker thereof be not named a party to the same indenture (*c*).

(*x*) Anon. Mo. 70. pl. 191. D'Abridg-court v. Ashley, Mo. 818. Reynold v. Kingman, Cro. Eliz. 115.

(*y*) Ibid.

(*z*) Combes's case, 9 Co. 75, b.

(*a*) Grenfield v. Streech, 2 Dy. 132, a.

And see Burrell v. Jones, 3 Barn. & Ald. 47.

(*b*) Berkeley v. Hardy, 5 Barn. & Cres. 355; S. C. 8 Dow. & Ry. 102.

(*c*) 8 & 9 Vict. c. 106. s. 5.

An agent appointed simply to contract for the granting of a lease need not be authorised in writing (*d*), under the 4th section of the statute of frauds (*e*). But an appointment under seal is indispensable where his authority extends to the execution of a deed (*f*), or, it is submitted, to the demise of an incorporeal hereditament, which cannot be granted otherwise than by deed.

A person cannot by will authorise his executor to make leases in the name of the devisee of the estate (*g*).

Where one devised that his son should have the land at his age of twenty-four, and that his executor should repair his houses, and have the oversight and doing or dealing of all his lands and goods until such age, some difference of opinion prevailed on the bench whether the executor took an interest in the land, or an authority only; Fenner and Yelverton, relying on a case in Dyer (*h*), held that no interest passed; Williams and Popham thought that an interest did pass, Williams conceiving that he had an estate on a limitation to be determined at the son's age of twenty-four; but it was unanimously agreed, that, whether an interest passed to him or not, a demise made by the executor determined on the death of the son under the age of twenty-four years (*i*).

(*d*) *Coles v. Trecothick*, 9 Ves. 234.
250. *Clinan v. Cooke*, 1 Scho. & Lef.
22. 31. *Boyland v. Warner*, 1 Hay.
& Jo. 79. 88.

(*e*) 29 Car. 2. c. 3.

(*f*) *Horseley v. Rush*, cited, 7 Term
Rep. 209. *White v. Cuyler*, 6 Term
Rep. 176; S. C. 1 Esp. 200. *Berkeley*
v. Hardy, sup. *Williams v. Walsby*,
4 Esp. 220. *Steiglitz v. Eggington*, 1

Holt's N. P. C. 141.

(*g*) *Pigot v. Garnish*, Cro. Eliz. 678.
734.

(*h*) Anon. Dy. 26, b. pl. (170).

(*i*) *Carpenter v. Collins*, or *Collins*
Yelv. 73; S. C. Mo. 774; 1 Brownl. 88.
Moore reports that he died under 24.
Yelverton and Brownlow say that that
fact was not found by the jury.

XXII.—*Donees of Power of Leasing.*

1st, As to the nature and design of the power.

Every well-prepared settlement and will of real estate, unless its value be inconsiderable, or the circumstances of the case do not require it, contains a power of leasing. "Of all kinds of powers," said Lord Mansfield (*k*), "this is the most frequent. For the encouragement of farmers to occupy, stock, and improve the land, it is necessary that they should have some permanent interest. Unless the owner of the estate for life were enabled to make a permanent lease he could not enjoy to the best advantage during his own time; and they who come after must suffer by the land being untenanted, out of repair, and in bad condition. The plan of this power is for the mutual advantage of possessor and successor. The execution thereof is checked with many conditions, to guard the successor, that the annual revenue shall not be diminished, nor those in succession or remainder at all prejudiced in point of remedy, or other circumstances of full and ample enjoyment. There are two methods of leasing common in this kingdom: at the best rent, and upon fines, which, as the lives or leases drop, are considered among the annual profits." To render a lease by a tenant for life, jointress, tenant in tail (*l*), or other person having only a limited interest, an available estate against a remainder-man or reversioner, a power of leasing must be expressly given or reserved: it cannot arise by implication (*m*).

The design and object of the power are affected by various considerations. Sometimes it is conferred on the respective tenants for life, or tenants in tail themselves; sometimes on one or more of them; sometimes on trustees, or releasees to

(*k*) Taylor dem. Atkyns v. Horde, 1 Burr. 120-1. And see Campbell v. Leach, 2 Ambl. 748. Shannon v. Bradstreet, 1 Scho. & Lef. 61.

(*l*) Unless tenant in tail comply with

the provisions of the late Fines and Recoveries Abolition Act, 3 & 4 W. 4. c. 74; as to which, see ante, p. 86.

(*m*) Roe dem. Duke of Bolton v. Grantlam, 3 Burr. 1259.

uses, to be exercised with the consent of the tenant for life, or tenant in tail, for the time being; or, in the discretion of such trustees or releasees during the minority of children; and authorises, according to the intention, leases for occupation, or for building, mining, or agricultural purposes. The conditions which it may be deemed advisable to attach to the exercise of the power are of course discretionary in the donor; but experience has proved the expediency of some restraints of general application, from which, in ordinary cases of practice, it is not advisable to depart. The law, however, will reject a qualification which tends to the destruction of the power itself; for example: if there be a power to make a lease of a manor, or of any part thereof, so as the ancient rent be reserved, yet the donee may by virtue of this power make a lease of the services, parcel of the manor, upon which no rent can be reserved, otherwise the express power would be defeated (*n*).

2ndly, As to the instrument creating the power.

As every covenant to stand seised requires a consideration of blood or marriage (*o*), it follows that a general power of leasing created by that assurance cannot be supported at law, as the power might be exercised in favor of a person not within the range of the consideration (*p*). It is void though reserved to the covenantor himself (*q*). The fact of the appointment by way of lease being made to the son, daughter, or other person of the blood, of the covenantor makes no

(*n*) Carth. 429; cited with approbation by Lord Mansfield in *Goodtitle* dem. *Clarges v. Funnean*, 2 Dougl. 574.

(*o*) 2 Bla. Com. 333.

(*p*) *Mildmay's case*, 1 Co. 175, a.; S. C., nom. *Mildway v. Standish*, Mo. 144; cited, Mo. 372; S. C. Jeuk. Cent. 247, case 36; Cro. Eliz. 34, but this point not noticed. *Chute v. —*, 1 Lev. 30; S. C., nom. *Lady Dacres v. Hazel*, 1 Keb. 34. *Pine v. Pine*, 2 Keb. 809. 3 Salk. 385. *Cross v. Barse*, Rol. Ab. Powers, pl. 1. *Cross*

v. Faustenditch, Cro. Jac. 180. *Bolls v. Winton*, Noy, 122. *Sharington's case*, cited, Gouldsb. 173. pl. 106. *Baynes v. Belson*, T. Raym. 247. *Prince v. Green*, cited, 1 Ch. Ca. 161; 3 Ch. Ca. 91. Anon. Freem. Ch. by Hov. 85, case 93. *Goodtitle v. Pettoe*, Fitzgib. 299; S. C. 2 Stra. 934; 2 Barnard. B. R. 10. 90. 142. *Pigot's case*, Cary, 41. Anon. Cary, 30.

(*q*) *Baynes v. Belson*, T. Raym. 247. *Warwick v. Gerrard*, 2 Vern. 7.

difference (*r*); and, therefore, a particuilar averment that the lessee is of kin to the lessor is inadmissible(*s*). The original intention being to demise generally, the power is void *ab initio* (*t*).

It is otherwise if the power expressly confine the leases to be made in pursuance of it to persons within the original consideration (*u*).

So again, there is a difference where the consideration is general, as, "for divers good causes and considerations," and the covenant is in favor of a person certain of the covenantor's blood; and when the consideration is general, and the person is uncertain. In the former case, an averment of kindred is allowed, in the latter, it is not (*x*); though in the early case of Prince *v.* Green (*y*), where one covenanted to stand seised to the use of himself for life, remainder to his eldest son, with power to himself to lease a small part for forty years, which he accordingly afterwards exercised, for the benefit of a younger child, relief was given in Chancery; because the son claimed by the same conveyance by which the power was limited; and the conveyance was intended to have been by livery, but that the father was advised that a covenant to stand seised would be equally efficacious; and the law in Mildmay's case had been but lately adjudged; so that neither the party nor his counsel was aware that such power was not warranted by law. And in a later case (*z*), where leases were made by virtue of such a power, Lord Elsmere made a decree for the enjoyment of the lessees.

Similar restrictions are attached to powers of leasing in bargains and sales enrolled, where the necessary consideration is money or money's worth (*a*). And, therefore, if a man, in

(*r*) Mildmay's case, sup. Goodtitle *v.* Pettoe, sup.

(*s*) Ibid.

(*t*) Ibid.

(*u*) See cases cited, sup., note (*p*). Goodtitle *v.* Pettoe, sup. Fitzgib. 301.

(*x*) Mildmay's case, 1 Co. 176, b.

And see Bedell's case, 7 Co. 39. 40.

(*y*) Prince *v.* Green, or Chandler, 40 Eliz., cited, 1 Ch. Ca. 161. 263; 3 Ch. Ca. 91.

(*z*) Anon. Freem. Ch. 85. pl. 93.

(*a*) 1 Co. 176, a.

consideration of ten shillings paid by the bargainee, make a bargain and sale to him for life, with a general power of leasing, an appointee of the term under the power cannot support the appointment, as the consideration, which alone could raise a use in his favor, did not spring from him (*b*). Where the appointee is specially named in the bargain and sale as the party in whose favor the power is to be exercised, and pays a consideration to the bargainer at the time of the bargain and sale, it seems that he may take under an appointment (*c*); though a use cannot arise in his favor if the payment of the consideration be postponed until the exercise of the power (*d*). Should the bargain and sale express only a general consideration, as, "for divers good causes and considerations," &c., the bargainee, and, it should seem, an appointee under a power of leasing, if nominated in the bargain and sale, may aver that a valuable consideration was paid by him to the bargainer at the execution of that deed (*e*).

3dly, As to the rules for the construction of the power.

The rules for the construction of powers of leasing have been variously laid down by different judges, who have severally declared that they must be construed strictly (*f*); liberally (*g*); indifferently, without leaning on either side (*h*); equitably in favor of the donee (*i*); favorably for the donee (*k*); strictly for the tenant for life, and liberally for the remainder-man (*l*).

Lord C. J. De Grey said, that if the execution of a power of leasing were for the benefit of the remainder-man, it

(*b*) Poph. 81.

(*c*) *Parsons v. Mills*, 2 Rol. Ab. Uses, (M).

(*d*) Sugd. Pow. 122, 3rd ed.; and 6th ed. vol. 1, p. 159. Bacon on Leases, p. 149.

(*e*) *Mildmay's case*, 1 Co. 176, a. And see *Bedell's case*, 7 Co. 39. 40.

(*f*) *Fitzwilliam's case*, 6 Co. 32.

(*g*) Right dem. *Bassett v. Thomas*, 1 W. Blac. 446-9; S. C. 3 Burr. 1441.

Berry v. White, O. Bridgm. by Bann. 90.

(*h*) *Goodtitle dem. Clarges v. Funnican*, 2 Dougl. 573. Doe dem. *Earl of Jersey v. Smith*, 7 Price, 313, per Park, J.

(*i*) *Ward v. Hartpole*, 3 Bli. P. C. 470. 485.

(*k*) *O. Bridgm. by Bann.* 90. 93.

(*l*) *Orby v. Mohuu*, Gilb. Eq. Rep. 58. And see *Taylor dem. Atkyns v. Horde*, 4 Burr. 60. 125.

should receive a liberal construction; but if the donee of the power invaded the interest of the remainder-man, in order to benefit his own estate only, it should have another construction (*m*). Looking to the nature of the power, this construction appears to be most consistent with reason and justice: and of this opinion was Mr. Justice Bayley. The power to lease reserved to a tenant for life (said the learned judge) is a power by which one man is enabled to dispose of the property of another, and, therefore, we ought to take care that the tenant does not exceed the power, and that he shall not do that indirectly which he cannot do directly (*n*).

A distinction has been said to exist between those powers which are to be executed by persons having estates with such powers originally moving from themselves, and persons whose power over the property has been originally derived from others; and it has been thought that less latitude is to be allowed in the former case than in the latter (*o*). But this doctrine appears to be exploded (*p*).

The only rule on which the judges seem to have agreed, is, that powers must be construed according to the intention of the parties; and, as Lord Kenyon said, if judges, in construing the particular words of different powers, have appeared to make contradictory decisions at different times, it is not that they have denied the general rule, but because some of them have erred in the application of the general rule to the particular case before them (*q*).

The same construction obtains both at law and in equity (*r*), for the true construction must be the same in every court.

And it is apprehended that the decisions on cases arising on leases made by ecclesiastical persons (*s*), and by tenants in

(*m*) *Campbell v. Leach*, Ambl. 748.

(*n*) *Doe dem. Sutton v. Harvey*, 1 Barn. & Cres. 431; S. C. 2 Dow. & Ry. 539.

(*o*) *Per L. C. B. Richards in Doe dem. Jersey v. Smith*, 7 Price, 281. 353. 497; S. C. 1 Brod. & Bing. 97;

3 J. B. Mo. 339.

(*p*) Sugd. Pow. 6th ed. vol. 2, p. 328.

(*q*) *Pomery v. Partington*, 3 Term Rep. 665. 674-5.

(*r*) *Shannon v. Bradstreet*, 1 Scho. & Lef. 66.

(*s*) See ante, p. 238.

tail under the enabling statute (*t*), would equally apply to leases made by virtue of private powers, at least where there is a similarity of expression.

4thly, As to the exercise or execution of the power.

The power usually contains directions relating to, 1, the parties by whom, and, where consent is required, with whose consent it is to be exercised; 2, the time of exercising it; 3, the instrument, and mode of execution and attestation; 4, the parcels; 5, the term, and the period of its commencement; 6, the rent to be reserved; 7, a right of re-entry on non-payment, &c.; 8, the execution of a counterpart by the lessee, with a covenant for payment of rent; 9, exemption from punishment for waste; and, 10, sometimes, though not generally, other covenants and conditions adapted to the circumstances of the case are required to be inserted. The nature and construction of these provisions, and the consequences of non-compliance with them, will be noticed in this division, which will also contain some remarks, 11, as to the effect of the execution of the power; 12, as to the consequences of a defective execution; and, finally, as to the extinguishment and suspension of the power.

And, 1, as to the parties by whom, and, where consent is required, with whose consent, the power is to be exercised.

The parties by whom the power is to be exercised are always designated, either by name, or by reference to their character, as, tenant for life, tenant in tail, trustees, &c.; and it is scarcely necessary to mention that none but the parties appointed are capable of acting under it.

In the case of *Hearle v. Greenbank* (*x*), Lord Hardwicke said, that there was no precedent, either in a court of law or equity, where it had been held that a power over real estate executed by an infant was good; and as he could find no precedent for it, he would make none (*y*). And again, that

(*t*) 32 Hen. 8, c. 28. And see ante, p. 68.

(*u*) Ante, p. 68.

(*x*) *Hearle v. Greenbank*, 3 Atk. 695, 710.

(*y*) 3 Atk. 710.

if the law had been otherwise, it must have happened in abundance of instances, for powers were given to infants to raise money, to make leases, &c.; that infants came in the course of succession into possession, and yet it had never been held that they could exercise any such power over real estate; and that the applying for several private acts of parliament showed the sense of mankind in this respect (z). From the language of Bridgman, C.J., in the case of *Grange v. Tiving* (a), however, it would seem that an infant might execute a power of leasing, should the donor of the power expressly declare that infancy should not be a disqualification. His words were:—"If a man make a feoffment to the immediate use of J. S., for his life, who is then nineteen or twenty years old, and so of age of discretion, or to the use of Alice Still, who is then a feme covert, with power to make leases for three lives, &c., I will not determine whether a lease according to that power, executed by that infant, or feme covert, be good or not; for without all doubt it might have been limited by express words of the power, 'that he might make such leases whether he or she were within age, or of full age, or covert or sole'; and then it had clearly been good; for if he who was owner of the estate had no disability upon him, he might make use of any hand, how weak soever, to reach out that estate." And some words which fell from Lord Hardwicke in the case of *Hearle v. Greenbank*, cited above, where a power of appointment over real estate was given by the testator to his daughter, a married woman and an infant, appear to point to the same distinction. "The next consideration (said his Lordship) is, if there is anything particular in this power. First, As to the penning of the power: 'that they should permit and suffer his daughter, by any deed or writing, &c., notwithstanding her coverture, to give all his freehold &c.' What had the father therefore in view? Why, to exclude the disability of coverture, and this was all

(z) 3 Atk. 713.

(a) *Grange v. Tiving*, O. Bridgm. by Baun. 116.

he intended to guard against; and if he likewise intended to exclude the disability of infancy, he would have taken care equally to express it. The daughter at his death was upwards of nineteen years of age; and though he might think it right to give her this power during coverture, yet not so during her infancy. It is plain his view was to prevent the husband's influence, and to make all safe during her infancy: therefore, from the penning of this power, a strong objection arises against her executing it during infancy, for *expressio unius est exclusio alterius*" (b). In an earlier case (c) also Lord Hardwicke said, that a power that could be executed by an infant must be appointed to be executed by him whilst an infant.

Hence, it is apprehended, that a power of leasing cannot be exercised by an infant, unless the donor expressly declare that infancy shall not be a disqualification.

The powers of leasing given to infants and their guardians by a late act of parliament (d) have already been noticed (e).

A power of leasing may be reserved to a female; nor is it suspended by her subsequent coverture; but she and her husband may effectually exercise it without an assurance under the act for the abolition of fines and recoveries (f), as they formerly might without levying a fine (g).

Whether she alone may exercise it without the concurrence of her husband is not clearly settled. In the case of *Grange v. Tiving* (h), it was said by Sir Orlando Bridgman, C.J., that if a conveyance be to the use of J. S. and the heirs

(b) 3 Atk. 714.

(c) Ex parte The Committee of Lord Bradford, Ca. temp. Hardw. Ch. 133.

(d) 11 Geo. 4. & 1 W. 4. c. 65.

(e) Ante, p. 34.

(f) 3 & 4 W. 4. c. 74.

(g) Bayley v. Warburton, Com. 494. Harris v. Graham, 1 Rol. Ab. Authortie, (B), pl. 12. 2 Rol. Ab. Parolls, (C), pl. 6. And see Daniel v. Uply, Latch, 9. 39. 134: Bendl. 178. Dighton v. Tomlinson, Com. 194. Tomlinson,

or Thomlinson, v. Dighton, 1 P. Wms. 149; S. C. 1 Salk. 239; 10 Mod. 31; 2 Eq. Ca. Ab. 309. pl. 13. Travel v. Travel, cited, 2 Ves. 191; 3 Atk. 711. But see *Grange v. Tiving*, O. Bridgm. by Bann. 116.

(h) *Grange v. Tiving*, O. Bridgm. by Bann. 107-8. And see Ibid. Bannister's note (b); and Sir Edward Sugden's comments on that note, Sugd. Pow. vol. 1, p. 194, 6th ed.

of his body, with power for him or the heirs of his body to make leases, the heir of his body, being a feme covert, *without her husband*, or infant, cannot make such a lease whilst the disability continues; for the general words *heir of the body* shall not be construed to alter the rule or reason of the law, but must be understood of such an heir of the body who hath by law reason and will to do such an act. Sir Edward Sugden, however, maintains that the husband's consent is in no case necessary (*i*).

In an early case (*k*), where husband and wife seised of land in right of the wife levied a fine to the use of themselves for their lives, and afterwards to the use of the heirs of the wife, with a proviso that it should be lawful for the husband and wife at any time during their lives to make leases for twenty-one years, or three lives, it seems to have been held, that a lease made by the feme alone under their power was good against the husband surviving. But such a judgment, if correctly reported, gives reason to believe that the facts of the case are not correctly stated; for the power was clearly a joint one only in the husband and wife (*l*).

Where, under a settlement, an estate was limited to the use of the intended wife, in remainder on the decease of the intended husband, with a power of leasing by indenture to any person for a term not exceeding twenty-one years in possession; with the usual provisions respecting the reservation of the best rent, without fine; the commission of waste; the right of re-entry; and the execution of a counterpart by a lessee; it was held, that the donee could not, in exercise of the power, make a lease to a second husband; the court considering that a tenant for life with power of leasing is not in the situation of one who is merely empowered to appoint; but that he has a power coupled with an interest which requires a bargain between independent persons, and a grant which is not void at law; and that though a remain-

(*i*) Sugd. Pow. vol. 1, p. 185. 194;
6th ed.

(*k*) Godb. 327. pl. 419.

(*l*) See also Bacon on Leases, p. 150.

der-man has his remedy on the covenants of the lease when his estate vests in possession, that protection may be lost for want of a liability in the lessee during the coverture; and that the mischief may be incurable after a long enjoyment with complete immunity (*m*).

The powers conferred by a late act of parliament (*n*) for the renewal of leases of the property of married women are noticed in another place (*o*).

Powers of leasing vested in a lunatic are exercisable by the committee under the direction of the Lord Chancellor by virtue of the same act, which enacts (*p*), that where any person being lunatic (*q*) is or shall be seised or possessed of any land either for life or for some other estate, with power of granting leases and taking fines, reserving small rents on such leases, for one, two, or three lives, in possession or reversion, or for some number of years determinable upon lives, or for any term of years absolutely, such power of leasing which is or shall be vested in such person being lunatic, and having a limited estate only, shall and may be executed by the committee of the estate of such person, under the direction and order of the Lord Chancellor, entrusted by virtue of the King's sign manual with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind.

Before the legislature interfered, the Lord Chancellor had no jurisdiction in such a case (*r*).

The powers of leasing conferred by the same act on committees of lunatics over lunatics' lands have already been noticed (*s*).

If a power of leasing be given to trustees to preserve con-

(*m*) Doe dem. Hartridge *v.* Gilbert,
5 Q. B. 423; S. C. 1 Dav. & Meriv.
429.

(*n*) 11 Geo. 4. & 1 W. 4. c. 65.

(*o*) Post, Chapter on Renewals.

(*p*) Sections 23, and 31.

(*q*) The word *lunatic* is by the act,
sect. 2, declared to extend to and in-

clude "any idiot or person of unsound
mind or incapable of managing his
affairs." And see ante, p. 37, *et seq.*

(*r*) Ex parte The Committee of Lord
Bradford, Ca. temp. Hardw. Ch. 133.

(*s*) Ante, p. 38. And as to Renewals,
see post.

tingent remainders, they must in exercising it act precisely as if the estate were given to them in trust to let (*t*).

A power of leasing cannot be delegated (*u*); though in its creation it may be conferred on the assignee of the estate of the first donee; thus, where a settlement was made on A. in tail, with remainder to him for forty years, with a power to him and his assigns of the term to make leases for twenty-one years, or three lives, it was held, that the power was not confined to A. and his immediate assigns, but might be exercised by the assignee of the executor of a party to whom A. had assigned the term, as *assigns* included assigns in law as well as in fact (*x*).

If the consent of a particular person be required, such consent must be obtained and evidenced in the way prescribed by the power. Should he die, it is apprehended that the power cannot be exercised at all (*y*); should he become lunatic, the power cannot be exercised during his lunacy (*z*); nor has a court of equity jurisdiction to substitute the consent of his committee (*a*). Where the power is to be exercised with the consent of another in writing duly attested, the term *attested* implies that a witness should be present to testify that the party who is to execute the deed has done the act required by the power; and, therefore, where the donee of such a power demised the premises with the consent of the party named, "testified by her being a party to the indenture," it was held that the power was badly exercised (*b*).

2. As to the time of exercising the power.

The time of exercising the power must be strictly observed. Thus, a power to lease from time to time until some one of

(*t*) *Sutton v. Jones*; *Jones v. Sutton*, 15 Ves. 534.

(*u*) *Lady Graham's case*, cited in *Combes's case*, 9 Co. 76, a. *Palm. 436*. *Coxe v. Day*, 13 East, 118. *Blore v. Sutton*, 3 Meriv. 237. 245-6. And see *Symons v. Symons*, 6 Madd. 207. 1 Rol. Ab., *Authoritie*, (E).

(*x*) *Whitfield v. How*, 2 Show. 57; S. C., *nom. How v. Whitfield*, 1 Vent.

338. 339; T. Jo. 110. And see *Collett v. Hooper*, 13 Ves. 255.

(*y*) *Danne v. Annas*, 2 Dy. 219, a. *Simpson v. Hornsley*, Free. Ch. 452. *Frankelen's case*, cited, Mo. 62.

(*z*) *Ex parte Smyth*, 2 Swanst. 393.

(*a*) *Ibid.*

(*b*) *Freshfield v. Reed*, 9 Mees. & Wel. 404.

the testatrix's children shall attain the age of twenty-one years, will not authorise the grant of a lease after one of the children shall have attained his majority (c).

So, a power given to, or reserved by, a feme sole to make leases, being sole, cannot be exercised during subsequent coverture, either by herself alone, or jointly with her husband (d).

Where a power was given to a tenant for life *in possession* to demise for twenty-one years, and he conveyed by lease and release his life estate to a trustee, upon trust to apply the profits in payment of an annuity during the donee's life, and the surplus to the donee; and afterwards conveyed all his estate to trustees for ninety-nine years, if he should so long live, for payment of his debts, but with an express reservation of all leases granted and to be granted; and then granted a lease of the premises to one who was in possession as tenant at will; this was held to be a good lease; for *possession* here meant receipt of the rents and profits which were applied to his use. If actual possession were necessary, a leasing power could never be executed where the land is in the hands of a tenant (e).

So, where a power was given to successive tenants for life when and as they should be in the actual possession of the premises by virtue of the limitations of the settlement, and not before, to make leases, &c., and the tenant for life in possession conveyed by lease and release his life estate to trustees, upon trust to reserve an annuity thereout, and to pay the remainder of the rent to the order of the tenant for life; and the trustees covenanted that in case the existing lease of the premises should expire in the lifetime of the tenant for life, it should be lawful for him to let the same to such person and for such term as he should think proper, with the

(c) *Bowes v. East London Waterworks Company*, 3 Madd. 375; S. C., on appeal, Jacob, 324.

(d) *Antrim v. Duke of Buckingham*, 1 Ch. Ca. 17; S. C. Freem. Ch. 163; 1 Sid. 101; 3 Salk. 276; cited, Com. 496.

And see *Burnham v. Bennett*, 2 Col. V. C. 254.

(e) Ren dem. *Hall v. Bulkeley*, 1 Dougl. 292. *Goodtitle dem. Clarges v. Funucan*, 2 Dougl. 565.

consent of the trustees, it was held, that a lease granted by the tenant for life, in conformity with his power of leasing, and with the consent of the trustees, could not be disturbed by the remainder-man (*g*).

But where an estate was conveyed to A. for life, with remainder to B. for life, with a power to A. during his life, and *after his decease* to B., to lease, &c., and A. conveyed his life estate to B., it was held, that a lease granted by B. during A.'s lifetime could not be supported (*h*). Had the power been reserved to A. and his assigns, it seems that B. might have executed a valid lease under it (*i*).

Unless the donee be clearly confined to a single exercise of a power of leasing, there is no doubt that it may be repeatedly exercised without the words *toties quoties*; and that when one lease so made expires, the lessor by virtue of his power may make another (*k*).

3. As to the instrument, and mode of execution and attestation.

The power is generally required to be exercised by indenture, to be sealed and delivered by the donee in the presence of and attested by one, two, or more, creditable witness or witnesses; but this is not universally the case.

By a late act of parliament (*l*), a deed executed after the 1st of October, 1845, purporting to be an indenture, shall have the effect of an indenture although not actually indented.

A lease for lives made by virtue of a power needs no livery of seisin to support it (*m*), as the estate derived under the exercise of the power flows, as will be more fully explained hereafter, out of the seisin vested in the original feoffees, devisees, or releasees, to uses, by the instrument conferring the power, and is executed in the lessee, or rather appointee,

(*g*) Long v. Rankin, Sugd. Pow. 6th ed., Appendix, No. 2.

(*h*) Coxe v. Day, 13 East, 118.

(*i*) Ibid. How v. Whitfield, T. Jo. 110; S. C. 1 Vent. 338. 339.

(*k*) Berry v. White, O. Bridgm. by

Bann. 97.

(*l*) 3 & 9 Vict. c. 106. s. 5.

(*m*) Ld. Raym. 166. 1 Vent. 291.

Taylor dem. Atkins v. Horde, 1 Burr. 60. 123.

by the statute of uses (*n*). At one time it appears to have been held (*o*), that if tenant for life with power of leasing made a lease for the life of another, accompanied with livery, he forfeited his own life estate, because he assumed to be owner of an estate sufficient for the purpose, which he was not. But Hale was of opinion that a forfeiture would not accrue in such a case, the deed on execution being effectual as an appointment, and the livery coming too late (*p*). There can be no doubt, however, that livery is improper.

As no particular form of words is necessary to the exercise of the power, it is immaterial whether words of common law demise, or words of appointment by way of limitation, be used. All that is required is, that an intention to exercise the power be apparent.

Nor is it necessary to recite either the power or the terms of the appointment. It is sufficient if there be such a dealing with the estate as can only be effectuated by virtue of the power (*q*). The rule is, if the instrument of execution will work two ways, the one by way of interest, the other by way of authority or power, and it is indifferent whether it work one way or the other, the law will attribute it to the interest, and not to the authority; but where interest and authority meet, if the party clearly declare that it shall take effect by virtue of his authority or power, then such expressed intention will prevail against interest; for *modus et conventio vincunt legem* (*r*).

And if the lease, if construed to be derived out of the interest, would have some effect, but not all intended by the parties, then, in order to effectuate the main design, the estate will pass under the power. Hence, if tenant for life with power of leasing for twenty-one years grant a lease for

(*n*) 27 Hen. 8. c. 10.

(*o*) 1 Vent. 291.

(*p*) 1 Vent. 291. *Wigson v. Garret*,
2 Lev. 149; S. C. and S. P. 3 Keb. 512.
Isherwood v. Oldknow, 3 Mau. & Selw.
382. 405.

(*q*) 1 Vent. 228. 2 Bro. C. C. 303.
Campbell v. Leach, Amb. 748. 2 Ball
& Beat. 44.

(*r*) Hob. 159. *Roe dem. Earl of*
Berkeley v. Archbishop of York, 6
East, 86. 108; S. C. 2 Smith, 166.

that period, without any reference to his power, it shall be presumed to be granted by virtue of the power, for, if granted out of the ownership, it would not endure beyond the lessor's life (*s*).

If a legatee for life of leaseholds, remainder over, with power of leasing, be also appointed executor, his entry into the premises is not of itself conclusive proof of his taking in the capacity of legatee: there must be other evidence of his assent to the legacy; and, therefore, where a party in this situation granted a lease for forty-one years, the court held it to be derived out of the executor's interest, as executor, and not as legatee. Nor were acts subsequent to the lease admitted to show an intention to take as legatee (*t*).

It is observable, however, with regard to the instrument, that there may be an equitable, as well as a legal, execution of the power. Thus, if a contract for a lease by a tenant for life under a power of leasing be finally concluded between the parties, and in all respects consistent with the power, it is, in equity, as binding on the remainder-man as a lease actually executed (*u*). And specific performance of such a contract may be enforced alike by the lessee or remainder-man (*x*). If the bill be filed by the lessee, the remainder-man need not be made a party (*y*). But, to justify the interference of equity, an intention to execute the power must be apparent (*z*). And, therefore, where J. S., tenant for life with power of leasing died, and the estates were partly in the occupation of tenants from year to year, under agreements in writing

(*s*) 1 Vent. 223. *Campbell v. Leach*, Ambl. 748. *Thomlinson v. Dightou*, 10 Mod. 36; S. C. 1 P. Wms. 149; 1 Salk. 239; Com. 194; 2 Eq. Ca. Ab. 309.

(*t*) Doe dem. *Hayes v. Sturges*, 7 Taunt. 217; S. C. 2 Marsh. 505.

(*u*) *Campbell v. Leach*, Ambl. 740. 749; S. C. 11 Serjt. Hill's MSS. 112; Sugd. Pow. 6th ed., Appendix, No. 26. *Shannon v. Bradstreet*, 1 Scho. & Lef. 52. *Lowe v. Swift*, 2 Ball & Beat. 535. *Blore v. Sutton*, 3 Meriv. 247. *Symons*

v. Symons, 6 Madd. 207. *Corry v. Corry*, Wallis, by Lyne, 278. *Butler v. Powis*, 2 Col. 156. *Clarke v. Moore*, 1 Jo. & La Ton. 723.

(*x*) *Shannon v. Bradstreet*, 1 Scho. & Lef. 64. *Campbell v. Leach*, Ambl. 749. Sugd. Pow. 6th ed., Appendix, No. 26. *Butler v. Powis*, sup. *Clarke v. Moore*, sup.

(*y*) *Corry v. Corry*, Wallis, by Lyne, 278.

(*z*) *Shannon v. Bradstreet*, 1 Scho. & Lef. 63.

differently expressed, signed by the tenants, and witnessed by the agent of J. S., but not signed by J. S. himself; and partly in the possession of tenants under agreements by parol, or under written agreements with J. S., signed by the tenants, but not by him, for terms of years, none of them exceeding three years from the commencement; it was held, that the agreements could not be considered as equitable executions of the power of the tenant for life, even if they were to be considered as his act (*a*). The clause conferring the power in the case of *Symons v. Symons* expressly dispensed with the necessity of a reference to such power by the deed by which it was to be exercised.

The agreement must also be clear and explicit in its terms, and conformable to the statute of frauds (*b*); for unless it be so complete that it would have been enforceable by either of the original parties; if, for instance, it be a dealing resting merely in treaty (*c*), or if the agreement be signed by the delegate of an agent, instead of by the agent himself (*d*), the remainder-man will not be bound.

Although a formal agreement will affect a remainder-man, a parol agreement partly performed will not (*e*), unless, with knowledge of the imperfect nature of the agreement, he acquiesce in the tenant's expenditure of money on the premises, after the vesting of the remainder (*f*). The ground on which the contracting party is bound in these cases is fraud, and fraud is personal (*g*); and, therefore, mere acquiescence in the tenant's outlay, without fraud on the part of the remainder-man, will not prevent his availing himself of the statute of frauds to annul a parol agreement; for the *primâ facie* presumption

(*a*) *Symons v. Symons*, 6 Madd. 207. And see *Ex parte Smyth*, *Mre Smyth*, 1 Swanst. 337. *Clarkson v. Lord Scarborough*, 1 Swanst. 354, note.

(*b*) 29 Car. 2. c. 3. s. 4. As to a parol agreement and part performance, see *infra*.

(*c*) *Lowe v. Swift*, 2 Ball & Beat. 529. *Blore v. Sutton*, 3 Meriv. 245-6.

(*d*) *Blore v. Sutton*, 3 Meriv. 237. 245-6. And see *Symons v. Symons*, 6 Madd. 207.

(*e*) *Shannon v. Bradstreet*, 1 Scho. & Lef. 72. *Blore v. Sutton*, 3 Meriv. 246.

(*f*) *Ibid*.

(*g*) *Ibid*.

is, that he who is making an outlay has a valid lease under the power, or at least a binding agreement for a lease (*h*). But if, with notice of the tenant's defective title, he encourage expenditure in improving the premises (*i*), his conscience is as much affected as was that of the party originally entering into the parol contract. In a case of an actual lease under a power, but with covenants not according to the power, Lord Hardwicke held that similar circumstances would bind the remainder-man to grant a lease for the same term, with covenants conformable to the power (*k*).

In the cases above noticed in which equity has aided a defective execution of the power, the lessee or parties claiming under him were considered as purchasers, from having either paid a fine or expended money in improving or building on the property (*l*) ; but, according to an early case (*m*), the same relief would not be administered against a remainder-man in favor of a mere lessee at a rack-rent. It was there held, that where a lease was made purely voluntary, and no provision for a child, if the lease were not good at law, it should never be made good in equity ; but that if a lease were made to a tenant at a rack-rent, without a fine, which was voluntary, yet if the tenant had been at any considerable expense in building or improving, the court would supply the defective execution of the power ; but otherwise not.

If a tenant under a defective agreement for a lease under a power have no equity against a remainder-man for a specific performance, equity will not decree him a compensation, out of the assets of the deceased tenant for life, for expenditure in improvements of the property made on the faith of such agreement, as it would be rather a decree for damages, than a compensation for the benefit the estate had received (*n*).

(*h*) *Ibid*.

(*i*) *Ibid*. *Dann v. Spurrier*, 7 Ves. 235-6.

(*k*) *Stiles v. Cowper*, 3 Atk. 692. And see *Bowes v. East London Waterworks Company*, 3 Madd. 375 ; S. C. Jac. 324.

(*l*) And see *Anon. Freem. Ch.* 224, case 296. And *Doe dem. Collins v. Weller*, 7 Term Rep. 478. 480.

(*m*) *Anon. Freem. Ch.* 224, case 296.

(*n*) *Blore v. Sutton*, 3 Meriv. 237. 247.

Where the power requires the lease to be executed in the presence of two or more credible witnesses, a party present and seeing the lease executed, but not required to be a witness, is not a witness within the meaning of it. The party witnessing should at the time of the transaction be clothed with the character of a witness, selected, designated, and called upon, to be such, and apprised at the time that he is such. It is not enough that he should be a witness in the ordinary sense, capable of giving evidence of the transaction; but he must be a person selected and called upon by the parties (*o*).

4. As to the parcels.

Doubts are sometimes occasioned by the parcels to be inserted being referred to by the deed creating the power in terms of particular selection, or by being coupled with collateral circumstances difficult of ascertainment. How frequently, for example, do we find powers authorising the leasing of such parts of the premises only as have been “anciently demised,” or “usually demised;” or annexing as a condition that the “ancient or accustomed rent” be reserved; and, hence, apparently excluding from the operation of the power such premises as have not been previously in demise. It is true, that the principal object of the courts in construing powers is to carry into execution the intention of the parties; and that, with this view, they are accustomed to take into consideration not only the mere language of the power, but also the nature of the property, the character of the parties on whom the power is conferred, and indeed any circumstance which may tend to explain that intention. Still, it is not easy, even allowing that principle of construction its full operation, to reconcile the various decisions.

The words “usually or accustomedly demised” may have two senses; the one signifying the frequent or repeated act of leasing; the other, the common continuance of land in lease, though it has not been more than once demised, as in

(*o*) *Lessee Church v. Donnell*, 4 Irish Law Rep. 306.

the case of lands leased for 500 years long since (*p*). And this is the more common acceptation of the words "usually demised"; though, in a literal sense, land once let is not land usually demised (*q*). Land twice demised is clearly included in that term (*r*); though lands let by virtue of a contract from year to year for three years cannot be said to be usually demised, because it is but one lease, though renewable every year (*s*).

In the case of *Right v. Thomas* (*t*), a settlement was made in 1737 containing a power to the several tenants in possession, or to the trustees during their minority, to lease for one, two, or three lives, or for years determinable upon one, two, or three lives, any part of the premises which had been usually so letten, so as such rent as had been given for twenty years past, or a proportionable part, should be reserved thereon; and, in execution of this power, the trustees, in 1742, demised the premises for ninety-nine years determinable on three lives; and the question was, whether the premises had been *usually so letten*. It appeared that they had been let in 1533 for fifty-five years; in 1576, for forty years from and after the expiration of the former lease; in 1608, for ninety years, determinable on three lives, from and after the term then subsisting; and that, in 1638, the reversioner in fee, in consideration of natural love and affection, covenanted that he and his heirs would stand seised of the premises to the use of himself for life, with remainder to his son for ninety-nine years, if he or any wife he should marry, or any issue he might have, should so long live. It was contended that the leases in 1533 and 1576 (*u*) were both for terms absolute, and, therefore, not of the kind required; that the lease of 1608 was for ninety years, and not ninety-nine, as in the power; but that if good, still one instance would

(*p*) *Tustian, or Tristram, dem. Gore v. Roper, Viscountess Balinglass*, T. Jo. 27; S. C. Vaugh. 23.

(*q*) *Ibid.*

(*r*) *Ibid.*

(*s*) 2 Rol. Ab. 262. pl. 14.

(*t*) *Right dem. Basset v. Thomas*, 1 W. Blac. 446; S. C. 3 Burr. 1441.

(*u*) In the report, 1536.

not create a custom of so letting; and, besides, that any rent reserved upon that lease would not be a rent reserved within twenty years preceeding the year 1742; and that the covenant in 1638 was a transaction of another nature, a provision for a man's son, in consideration of natural affection. But the court, considering the covenant to stand seised equal to a lease, with a remission of the fine in favor of the son, held, that the premises had been usually so letten, and that the power was well exercised. They likened it to the case of bishops, deans, &c., and tenants for life, with similar powers, granting beneficial leases of such estates as chance to fall in, in trust for themselves and their children.

But in *Doe v. Halcombe* (x), a power to lease for one, two, or three lives, or for any term of years determinable on one, two, or three lives, in possession, reversion, or remainder, such part and parts and so much only of the said manors, lands, &c., as were then demised or granted *for any such time*, was held not to comprise lands in lease by a former owner for ninety-nine years determinable on the lives of his son, any widow left by that son, his eldest son, or eldest daughter, living at his decease, or in ventre sa mere; for that could not be accounted a lease determinable on one, two, or three lives; inasmuch as when one died, another was to spring up in his room. It was said that the lives under such circumstances must be concurrent.

In a recent case (y), where a power was given by will to a tenant for life to lease, in possession or reversion, for one life, or for two or three lives, any part of the said premises usually so leased, and the donee comprised in one lease two distinct properties usually leased separately, it was contended that, as the power only authorised the letting of any part of the premises *usually so leased*, and as the parcels united in the lease had not been usually so leased, but had been usually let separately, the lease could not be supported; but it was held,

(x) *Doe dem. Wyndham v. Halcombe* 7 Term Rep. 713.

(y) *Doe dem. Lord Egremont v. Stephens*, 6 Q. B. 208.

that tenements which are all under a power may be joined and separated *ad libitum*, provided the due proportion of rent be reserved, as in *Doe dem. Earl of Shrewsbury v. Wilson* (z). It was also held, that the words *usually so held*, on which the objection was founded, related to the time and duration of the lease, and not to the joining or separating of the premises.

The enabling statute of 32 Hen. 8. c. 28, is a pattern for the construction of powers of leasing in private conveyances; and in an earlier page (a) we have shown what demises are comprehended within the term *most commonly been let to ferm.* The reader is, therefore, referred to that part of the work in which this subject is treated at length.

We may now proceed to the consideration of the cases in which the power has required a reservation of the "usual or accustomed rent," or the like; first noticing such leases as have been supported as valid executions of the power; and, secondly, such as have been set aside on the ground of their including parcels not subject to the power.

Cumberford's case is perhaps the earliest, and is generally cited as a leading authority on the subject. It is reported in Rolle's Abridgment (b), not as an abridged case from another book, but as a MS. case furnished him by a friend. Translated, it runs thus:—"If a conveyance be made to uses of divers manors and lands, viz., to the use of J. S. for life, &c., with a power to make leases of the premises, or any part or parcel thereof, for three lives, or years determinable on three lives, so that such rent or more be reserved upon every lease as had been reserved or paid for the same within two years then next before, and some of the land had not been leased before at any rent within the two years, he can by force of this power make such lease of this land, reserving what rent pleaseth him (c); for it appears by the generality of these words, that it was intended he should

(z) 5 Barn. & Ald. 363.

(a) Ante, p. 73.

(b) Cumberford's case, 2 Rol. Ab.

Powers, (A). pl. 15.

(c) And see *Campion v. Thorpe*,

Clayt. 99. *Winter v. Loveday*, Com. 41.

have a power to lease all the land: And this does not resemble leases to be made by force of the statute, 32 Hen. 8, or 13 Eliz., for there the intent is apparent that no land should be leased but that which was leased before.”

But this case has not been followed as an authority without reluctance. Hale felt himself bound by it in the case of *Waker, or Walker, v. Wakeman* (*d*), to which I shall next address myself, adding, however, that if it were *res integra* perhaps he should be of a different opinion (*e*). And Mr. Justice Grose more recently expressed himself as differing from the construction given to the words there used, though he agreed with the principle on which the case was determined (*f*).

In the case of *Waker, or Walker, v. Wakeman* (*g*), an estate, consisting of land and a rectory, was conveyed to the use of one for life, with a power to let the premises, or any part of them, so that upon every lease there should be reserved five shillings an acre for every acre of the premises so demised. The rectory consisted of tithes only, without any glebe. A lease was made of all the premises, including the tithes, reserving a rent which amounted to more than five shillings an acre for the land, but nothing for the tithes; and it was determined that the lease was good; according to Ventris's report, because the last clause being affirmative should not restrain the generality of the former, the resolution being chiefly grounded on *Cumberford's* case; according to Levinz, solely on the authority of that case, though with the qualification of Hale's implied dissent above noticed.

The case of *Goodtitle v. Funucan* (*h*) was peculiar in its circumstances. A power was given by a settlement to the tenant for life to demise all or any of the said manors, mes-

(*d*) *Waker, or Walker, v. Wakeman*, 2 Lev. 150; S. C. 3 Keb. 544. 547. 536. 595. 619; S. C., nom. *Walker v. Wakeman*, 1 Vent. 295; S. C., nom. *Wakeman v. Waker*, Freem. 413.

(*e*) And see *Foot v. Marriot*, post, p. 419.

(*f*) *Pomery v. Partington*, 3 Term Rep. 678.

(*g*) *Waker, or Walker, v. Wakeman*, or *Wakeman v. Waker*, sup.

(*h*) *Goodtitle dem. Clarges v. Funucan*, 2 Dougl. 565.

suages, lands, tenements, fisheries (*i*), and hereditaments, or any part thereof, for a term mentioned, so as there should be reserved so much, or as great yearly rents as, or more than, then was and were paid and yielded, or agreed to be paid and yielded, for the same, or proportionably for any part thereof. The tenant for life, reciting the power, demised all the manors and fishery and a certain messuage and other hereditaments subject to the settlement, with the rights, &c., at the yearly rent of 134*l.*, which was recited to be more than was paid for the demised premises at the time of the settlement. The manors or manorial rights had never been let before; the fishery had been previously demised, but was not at the creation of the power; since that time it had again been let at 15*s.* The 134*l.* payable by the defendant was about 30*l.* more than the demised premises had ever produced before. Under these circumstances, it was contended that the power could not be extended to the manors and fishery, the manors never having been let, and the fishery not being let at the time of the settlement, and the power requiring the rent then paid or more to be reserved. The court, however, thought otherwise. The judgment, which was pronounced by Lord Mansfield, was chiefly founded on a rule laid down by Lord Holt; "that where a qualification is annexed to a power of leasing, which, if observed, goes in destruction of the power, the law will dispense with such qualification" (*k*). They considered this rule to be applicable to the case before them, where no intent appeared, and nothing arose from the nature of the case, to exclude the manor and fishery from the power, which particularly mentioned them by name: And they held, that the words and intent of the power were alike justified by the lease in question. It is observable that Lord Mansfield referred the decision in *Cumberford's* case to the rule pronounced by Lord Holt.

(*i*) That the fisheries were expressly included in the power appears from Lord Mansfield's judgment, though that fact is not mentioned in the body of the report. It is, however, admitted to

have been the case, in the 4th edition of Douglas by Serjt. Frere, vol. 2. p. 574, n. [~~§§~~].

(*k*) *Winter v. Loveday*, Carth. 429.

Such are the cases in which premises not usually the subject of demise, and on which the ancient or accustomed rent could not be reserved, have been held to be within the operation of the power. We now come to the examination of those which have received a different construction.

In the case of *Tustian, or Tristram, v. Roper, Lady Baltinglass* (*l*), it appeared, on a special verdict, that a settlement was made in the 12th year of the reign of King James the 1st of certain premises, with power to tenant for life to demise all or any of the said premises which at any time theretofore had been usually set or demised, reserving the rents then yielded or paid, or more, &c. The premises in question had been demised by an indenture dated 20th May, 12 Eliz., 1570, for twenty-one years, at a yearly rent of 100*l*.; but it did not appear that they had been demised since that time, until they were comprised in a lease made, 23 Car. 1, by the tenant for life in the settlement, reserving the same rent of 100*l*. Under these circumstances, the court was clearly of opinion, that the lease was not warranted by the power; for what was not demised when the proviso was made, nor twenty years before, could not be said to be at any time before commonly farmed. The power (said L. C. J. Vaughan, who delivered the judgment of the court,) is, that leases may be made, reserving the rents thereupon reserved at the time of the deed made in 12 Jac., which necessarily implied that land demisable must be land which was then under rent; for where no rent then was, the rent then thereupon reserved could not be reserved; and as the premises in question had then no rent reserved upon them, they were not demisable by virtue of the power (*m*).

The reader will not fail to perceive the difference between this and *Cumberford's* case. That was generally to let all or any of the lands without restraint; while this was restrained to lands usually let or demised, and, therefore, the very power

(*l*) *Tustian, or Tristram, dem. Gore v. Roper, Viscountess Baltinglass*, T. Jo. 27; S. C. Vaugh. 28. The judg-

ment is better reported by Vaughan.

(*m*) See also *Mountjoy's case*, 5 Co. 3, b. 5, b.; S. C. Mo. 197.

failed as to those premises which were not so qualified. Otherwise, the reservation of a rent where none was reserved before would not appear to be an objection to the lease (*n*).

This case of *Tustian v. Roper* was followed by *Baggott v. Oughton* (*o*). A settlement was made of certain premises on the husband for life, remainder to the wife for life, &c.; and a power was given to any person who should be actually seised of the lands by virtue of the settlement to make a lease or leases for three lives, or for twenty-one years, of all or any part of the premises, at such yearly rents, or more, as the same were then let at: the husband died; and the wife, having married again, demised the capital messuage to her second husband (*p*), for twenty-one years, but reserved no rent; and the whole court were of opinion that the lease was void; and this opinion was, on argument, affirmed by the Lord Chancellor, whose decree was affirmed in the house of lords on appeal (*q*).

Lord Mansfield recorded his unqualified approbation of this decision, when cited as a precedent for a similar determination in the case of *Goodtitle v. Funucan* (*r*) then before the court. "In the case of *Baggott v. Oughton*," said his lordship, "which has been much relied on, the nature of the thing showed that the power could not be meant to extend to letting the ancient manor house at all; much less to letting it without reserving any rent. In a family settlement of an estate, consisting of some ground always occupied together with the seat, and of lands let to tenants upon rents reserved, the qualification annexed to the power of leasing, that the ancient rent must be reserved, manifestly excludes the mansion-house

(*n*) See ante, p. 415-6. Bacon on Leases, p. 145.

(*o*) *Baggott v. Oughton*, 8 Mod. 249. 381; S. C. Fortesc. 332.

(*p*) Now held to be a bad execution of the power; see *Doe dem. Hartridge v. Gilbert*, 5 Q. B. 423; S. C. 1 Dav. & Meriv. 429; ante, p. 402.

(*q*) It appears by the registrar's book, that the judges of the K. B. cer-

tified their opinion in this case; Reg. Lib. A. 1716, fo. 433; but the certificate has been lost, and no decree can be found. Dougl. 569. Hill, Serjt., said, that it was very common for certificates to be lost, because the parties saved a small fee by not filing them. Ibid. n.

(*r*) *Goodtitle v. Funucan*, 2 Dougl. 565; ante, p. 415.

and lands about it never let. No man could intend to authorise a tenant for life to deprive the representative of the family of the use of the mansion-house. The words in such a case show that the power is meant to extend only to what has been usually let. By that means the heir enjoys all the premises in the settlement just as they were held and enjoyed by his ancestor, the tenant for life; he has the occupation of what was always occupied, and the rent of what was always let. We all, therefore, agree as to the rectitude of the decision in *Baggott v. Oughton*. The nature of the thing spoke the intent as forcibly as the most direct words could have done. It was demonstration."

In conformity with the two last cited cases, *Foot v. Marriot* (s) was decided. There, Serjeant Maynard devised several manors, messuages, &c., and, among them, the manor of Beer in the county of Devon, to trustees, to the use of his grandchild, M. M., for life, with remainders over, with power for M. M., when she by virtue of any clause in the will or the meaning thereof should be or ought to be in the possession of the manor of Beer, to lease all or any of the tenements thereof, for one, two, three, or four lives, or years so determinable, in possession, reversion, remainder, or expectancy, and under the new rents then reserved, and the like agreements and covenants as in the leases then in being, and by the then present tenants thereof respectively to be performed and kept, so as all the leases to be made, with other estates then formerly leased, then in being, should not exceed four lives, or (t) determinable by death of four persons at most in one tenement at one time. And the will contained a further clause, that T. G., and every other agent in his place appointed as thereafter mentioned, and every other person to whom the premises should come into possession, might then lease the same or any part thereof at rack or utmost reasonable rent, and such other agreements for reparations and against

(s) *Foot v. Marriot*, 3 Vin. Ab. 429. pl. 9.

(t) Thus in Vin. Ab. Qy. "should be" ?

waste as they could reasonably agree upon, such lease not to exceed the term of seven years. The plaintiff claimed, under a lease for three lives granted by M. M., for a valuable consideration, by virtue of the power, the barton of Beer, part of the manor of Beer, which was out upon a lease for lives at the time of Serjeant Maynard's purchase, but the lives happened to drop before the Serjeant made his will, and was in hand at the time of his death. Lord Chancellor King was assisted by Raymond, C.J., Denton, J., and Comyns, B., and they all concurred in opinion that the lease was not warranted by the power. King, C., said, that the word *tenement* in a will in legal understanding had a general signification, but in common understanding meant lands holden by tenants, and that appeared to be the meaning of the testator by the subsequent power to demise the premises for seven years at a rack rent. They considered the cases of *Tristram v. Viscountess Baltin-glass*, and *Baggott v. Oughton*, in point. But as to *Cumberford's* case, they said, that if that case were law, it should not be carried one step further.

Next came the case of *Pomery v. Partington* (*u*). There, a power was given by will to tenant for life to lease all or any of the said manors, parts of manors, messuages, lands, tenements, and hereditaments, to any person or persons whomsoever, for one, two, or three life or lives, or for the term of ninety-nine years to be determinable on the deaths of one, two, or three person or persons, either in possession or reversion, so as the usual rents, and other yearly payments, dues, reservations, and heriots, be from time to time reserved and made due and payable, and so as such lease or leases should not be made dishonourable of waste; and the donee leased a moiety of tithes which had never been demised prior to the will. And the court, upon the broad principle of intention, and conformably with the cases of *Baggott v. Oughton*, and *Goodtitle dem. Clarges v. Fumecan*, as the tithes had never been let, but had always been occupied by the possessor of

(*u*) *Pomery v. Partington*, 3 Term Rep. 665.

the estate, considered the lease unauthorised by the power, and therefore void. "There are indeed," said Lord Kenyon, "other grounds upon which stress might be laid to show that this was the intention of the deviser, if it were necessary to have recourse to them. In the enumeration of the property to be leased, every particular mentioned is a corporeal hereditament: the word 'hereditament' is indeed sufficiently comprehensive in its general signification to include tithes, but the other words which accompany it show the sense in which it is to be taken here. Another circumstance is, that the leases are not to be dispunishable of waste, a provision which could not apply to tithes. But (continued his lordship) I do not wish to rely on these small circumstances, my opinion being founded on the general intention of the party, which is fairly to be collected from the other part of the case." Mr. Justice Buller distinguished this case from *Goodtitle v. Funu-can*, first, on the ground of the power in the latter expressly extending to the manor and fishery, which showed that it never could have been the intention to annex the restriction of reserving the usual rent to the demise of the manor, because it had never been let before; next, on account of the value of the manor being merely nominal; and, thirdly, on account of the smallness of the fishery, which was worth only 15s. per annum, and had been let once before, though it was not in lease at the time of the settlement; whence the intent was concluded to be, that the party might let all the premises, reserving as much rent in the whole as had been reserved before. And the learned judge also remarked that, in that case too, the court relied on the words at the end of the power, "or proportionally for any part thereof," though no notice was taken of it in the printed report. For those words showed that it was the intention of the parties that the quantum of the rent, and not any particular part of the premises included in the settlement, was to guide the person in executing the power. But that, in the principal case (*Pomery v. Partington*), the deviser did not intend that any part of the estate should be let but that which had been usually demised before.

To the same effect was Doe dem. Bartlett *v.* Rendle (*v*). The testator, being seised in fee, devised to W. B. and A. N. and their heirs all his lands, tenements, and hereditaments, to the use of his grandson, W. B. B., for life, with remainder to trustees to preserve contingent remainders, with remainders over; and he gave power to the trustees, and the survivor, and the heirs and assigns of the survivor, from time to time during the minorities of his said grandsons, or of any other person to whom the premises should descend, and afterwards to any tenant for life under the limitations therein aforesaid, to grant any lease or leases of all or any part of the said messuages, &c., for (*x*) not exceeding three lives in possession or reversion, so as upon such lease or leases there should be reserved the ancient or accustomed yearly rent or rents, heriot and heriots, and other things, usually paid for the same premises. After the testator's death, W. B. B. demised part of the premises under the description of "all that messuage, &c., at Aylscomb, otherwise Colley End," which, it appeared, comprehended, besides lands anciently and usually demised, two pieces, called Smallacombs and Knavesash, which had never been before demised; and on that account the lease was held to be void. This case is a proof that the situation and character of the donee may be circumstances to show what premises the power of leasing is intended to comprehend; the court being of opinion that the intention was plainly proved by the power being given in the first instance to the trustees; and that it never could be intended that they who might have had an interest for a day only, and who were not intended to have any beneficial interest for themselves, should be able to alter the nature of the property, and prevent the tenant for life from occupying what the testator had always reserved for his own occupation. They thought that the necessary purposes of the power would be fully satisfied by suffering the trustees and the tenants for life to let what had been let before; and that when they went beyond that, their

(*v*) Doe dem. Bartlett *v.* Rendle, 3 Mau. & Selw. 99.

(*x*) Thus in the report.

power was exceeded, and, consequently, that the lease was void.

So, where a power was given by will to a tenant for life to lease in possession or reversion, for one life, or for two or three lives, any part of the said premises usually so leased, so that (amongst other conditions) "there be reserved in every such lease, during the continuance thereof, the ancient and accustomed rents and heriots for the premises therein contained, or more"; and a lease was made comprising lands not subject to the power, as well as those which it authorised to be leased, at one entire rent, it was held, on the authority of *Doe dem. Bartlett v. Rendle*, just cited, that the mere joining of strange tenements at an entire rent was fatal to the lease; though the rents and heriots reserved were in fair proportion, in point of value, to the rents and heriots which had formerly been reserved in respect of all the tenements demised (*y*).

The only general rule furnished by these cases, that the intention of the donor of the power is to regulate the construction, is too vague to be of much practical service; since it does not remove the difficulty of discovering what that intention really is. Every case must, therefore, depend on its own language and circumstances.

A power of leasing, so as the leases be not made of such part of the said manor of G. as are the demesne lands of the said manor, and so as the ancient rent be reserved, will not authorise the donee to demise the copyholds: *Holt, C. J.*, proved this by the following syllogism: All the demesnes of the manor are expressly excepted out of this power. The copyholds are part of the demesnes. Therefore, copyholds are expressly excepted out of the power (*z*).

It has recently been decided (*a*), that a power of leasing all

(*y*) *Doe dem. Lord Egremont v. Stephens*, 6 Q. B. 208. 12 Mod. 147.

(*z*) *Winter v. Loveday, Lovedaz, Loveden, Loveder, Lovedore, or Lovedurr*, Com. 37; S. C. 5 Mod. 244. 378; *Holt*, 414; 1 Freem. 507; Carth. 427; 1 Ld. Raym. 267; Comb. 371; 2 Salk. 537; (*a*) *Dayrell v. Hoare*, 12 Adol. & Ell. 356; S. C. 4 Per. & Dav. 114. And see *Doe dem. Douglas v. Loek*, 2 Adol. & Ell. 705; S. C. 4 Nev. & Man. 807. *Wickham v. Hawker*, 7 Mees. & Wel. 63. 76.

or any part of the hereditaments devised will not authorise a lease of part, with liberty to hunt, course, shoot, and fish, over any other part of the property subject to the power; the grant of such a privilege not being a lease of any of the hereditaments devised. It is not a grant of the whole; for it contemplates that other parts are not leased: nor is it a grant of part; for, in the power, part is used with reference to the entirety which the tenant for life has. Supposing the estate to consist of two houses and a thousand acres of land, the power would enable the party to grant one house and one hundred acres; but the demise must be of the whole which covers the part demised; an easement cannot be granted by itself out of any separate part, as that would be subjecting the land to a servitude.

We may here repeat the general rule, that the law will dispense with a qualification annexed to a power, which, if observed, would tend to the destruction of that power (*b*): for instance: where there is a power to make a lease of a manor, or of any part thereof, so as the ancient rent be reserved, the donee may make a lease of the services, parcel of the manor, upon which no rent can be reserved; for otherwise the express power would be defeated (*c*).

5. As to the term authorised; and the period of its commencement.

Sometimes the term prescribed by the power is for years absolutely; sometimes for lives; sometimes for years determinable on lives; and the donee has frequently the option of selecting such of the three modes as he may consider most advantageous. The ordinary husbandry lease is for twenty-one years. Building leases are sometimes made under a settlement for sixty or ninety years (*d*); but there is no instance of a power in a marriage settlement to lease for

(*b*) *Winter v. Lovedaz*, Carth. 429;
S. C. as in note (*z*), ante, p. 423; cited
with approbation by Lord Mansfield in
Goodtitle dem. Charges v. Funucan, 2
Doug. 574; and by L. C. J. De Grey,

Amb. 748.

(*c*) *Ibid.*

(*d*) *Attorney-General v. Owen*, 10
Ves. 560.

ninety-nine years except with reference to very particular circumstances (*e*). And it is observable that a stipulation in articles on marriage, that the settlement should contain a power of leasing for twenty-one years in possession, a power of sale and exchange, of appointing new trustees, “and all such other powers, provisoes, clauses, covenants, and agreements, as were usually inserted in settlements of the like nature,” has been held not to authorise the insertion of a power to grant building leases, although, from change of circumstances, the situation of the premises might render them extremely eligible for building (*f*). In the case cited, the general words were considered of no effect, as opposed to the mention of the particular term for years to which the express power of leasing extended.

It is clear that a power to lease for a chattel interest will not authorise the grant of a freehold. Thus, under a power to lease for any term or number of years not exceeding twenty-one years, or for any term or number of years determinable upon a life or lives, a lease for lives absolutely cannot be granted (*g*). On the other hand, a lease for an absolute term of years, or for a term of years determinable on a life or lives, cannot be conferred under a power extending only to leases for a life or lives (*h*).

According to Bacon (*i*), it was said by the judges, in 3 Keb. 746, “that the construction in Whitlock’s case, that a person having power to make leases for three lives could not make a lease for ninety-nine years determinable on three lives, was too nice, and expressly contrary to the intent of the parties”; but it is observable that no such expression is to be found in the report referred to.

(*e*) Ibid.

(*f*) *Pearse v. Baron*, Jacob, 158.

(*g*) *Evans v. Vaughan*, 4 Barn. & Cres. 261; S. C. 6 Dow. & Ry. 349.

(*h*) Whitlock’s case, 8 Co. 69, b.; S. C., nom. *Chappel v. Whitlock*, 1 Brownl. 169; 2 Rol. Ab. 260. pl. 3. *Page v. Gee*, 1 Ambl. 198. 200; S. C.

2 Ambl. 807. 810; Appendix, (F), 2nd edit. by Blunt. *Roe dem. Brune v. Prideaux*, 10 East, 186. *Rattle v. Popham*, 2 Stra. 992; S. C. *Cunningh.* 102. 2 Burr. 1147. And see Lord Ellenborough’s remarks on that case, 10 East, 186.

(*i*) Bacon on Leases, p. 151.

We may here recur to a distinction, already noticed in treating of leases under the enabling statute (*k*), between a particular power affirmative, and a general power restrained by a negative; as it may furnish a key to the solution of numerous questions on the due exercise of powers of leasing. A power of leasing for three lives, or twenty-one years, is an instance of the former kind; and a power to make any lease or grant, provided such lease or grant shall not exceed the number of three lives or twenty-one years, is an example of the latter.

In Whitlock's case (*l*), in which the distinction was first taken, power was given to the tenant for life to make any lease or leases, with a proviso that they should not exceed the number of three lives or twenty-one years: the donee made a lease for the term of ninety-nine years, if two persons or either of them should so long live: and it was argued, that the intention of the power was that he should either make a lease for three lives, &c., or that if he would make a lease for years, it ought to be for twenty-one; and that, as the lease in question was neither one nor the other, the authority was not well pursued. But it was resolved that the power was properly exercised; for the proviso of creation of the power was in the beginning absolute, affirmative, and indefinite; scil., to make any lease or leases without any limitation; and then the proviso of correction was added, that such lease or leases should not exceed the number of three lives at most, or twenty-one years, which clause was negative, and qualified the generality of the first proviso; so that the power by the first was general, and by the second the lease ought not to exceed three lives, &c.; and when the lease was made for ninety-nine years determinable on two lives, it did not exceed the number of three lives, although in truth it was not a lease for lives.

Upon this distinction the decision in the case of *Roe dem.*

(*k*) 32 H. 8. c. 28; ante, p. 75-6.

S. C., nom. *Chappel v. Whitlock*,

(*l*) *Whitlock's case*, 3 Co. 69, b.;

Brownl. 169.

Brune v. Prideaux (*m*) principally rested. There the power of leasing was for any term or number of years not exceeding one-and-twenty years, or for the life or lives of any one, two, or three, person or persons; so as no greater estate than for three lives should be at any one time in being in any part of the premises. The part of the power, therefore, that authorised the grant of a chattel interest was a general power restrained by a negative; the part that related to the lease for a life or lives was a particular power affirmative; and, adopting this view of the case, the court held, that either a chattel or a freehold lease might be granted; the former not to exceed twenty-one years, nor the latter three lives; and that a lease for ninety-nine years if two persons or either of them should so long live could not be supported. It was argued that the lease if not good for the ninety-nine years, might still be good for twenty-one years, should either of the lives so long continue; but the judges considered it sufficient to say, that no authority was cited to show that a court of law had ever held itself entitled to consider such a lease as good in part (*n*).

Where the power is a general one restrained by a negative (*o*), as for any term of years not exceeding a specified number, there is no objection to a proviso enabling the lessor to determine the lease at any time on payment or tender to the lessee, his executors, administrators, or assigns, of one shilling, or the like (*p*). But it is apprehended that the law would be different in the case of a particular power affirmative, as to lease for a term certain (*q*).

The question whether, in the case of a general power restrained by a negative, a provision authorising the lessee to surrender his term at pleasure, could be supported, has occasioned much conflict of opinion.

(*m*) *Roe dem. Brune v. Prideaux*, Sugd. Pow. 6th edit. Appendix, No. 14, 10 East, 158. p. 596. 1st point. Reg. Lib. A. 1754.
 (*n*) *Ibid.* fol. 406.
 (*o*) See ante, p. 426. (*q*) See 2 Sugd. Pow. 355, 6th edit.
 (*p*) *Earl of Cardigan v. Montagu*,

In the case of *Jones v. Verney* (*r*), where there was a power of leasing for any term or number of years not exceeding sixty-one, for the encouragement of rebuilding, so as in every such lease there be contained a condition of re-entry for non-payment of rent, and the usual and reasonable covenants; and the lease contained a proviso that if the lessee should at the end of the first forty years of the term granted be desirous to determine the lease, and should give twelve months' notice of his desire in writing to the reversioner, then the term and estate thereby granted should, at the end of the said twelve months, absolutely cease and determine; Willes, L.C.J., who delivered the opinion of the court, said, that though he did not think that the proviso made the lease itself void, yet it showed plainly that the lease was not intended to be a building lease.

A similar power was given to the lessee in the case of *Doe dem. Dymoke v. Withers* (*s*); but no notice of it was taken by the counsel or court.

In *Lowe v. Swift* (*t*), where there was a power of leasing, for one, two, or three lives, or for any number of years determinable on the deaths of such lives, not exceeding thirty-one years, at the most improved yearly rent, without fine, so as in every such lease there should be contained a clause of distress and re-entry, and all other clauses and covenants usual between landlord and tenant, Lord Mannors was of opinion that a clause empowering the lessee to surrender his term could not be supported: he thought that such a clause would be a fraud on the leasing power, as the tenant would be at liberty to hold the lands so long as they were profitable to him, but if their value should be depreciated by any circumstance, bad husbandry, bad times, or otherwise, he would have a right to throw them up, to the prejudice of the remainder-man and the inheritance.

(*r*) *Jones dem. Cowper v. Verney*, Barn. & Adol. 896.
Willes, 169. A.D. 1739.

(*t*) *Lowe v. Swift*, 2 Ball & Beat.

(*s*) *Doe dem. Dymoke v. Withers*, 2 529. A.D. 1814.

In the case of Jack dem. *Wheatley v. Creed* (*u*), a settlement contained a power of leasing in these words:—"and also with the further and usual leasing power for three lives or thirty-one years in possession, and not in reversion, and without fine or fines or other benefit for granting such lease or leases;" and the lease contained a provision that it should be lawful for the lessee to yield up and surrender the premises unto the lessor on any first day of May after the expiration of the first five years of the term, on giving six months' previous notice, and paying all arrears of rent, &c. And the court of King's Bench in Ireland were of opinion, that the insertion of the clause of surrender was a fatal objection to the lease. They said that the power given was the usual leasing power for three lives or thirty-one years, that is, for any term of years or lives not exceeding three lives or thirty-one years, it not being necessary that the lease should be for the full term mentioned in the power (*x*); but that a lease for a life or lives absolutely, or for a term of years absolutely, was a very different thing from one for a life or years with a clause empowering the tenant by a surrender to determine it; in the former case both parties being bound during the term, and the quantum of rent being probably fixed with a view to that circumstance and the consequences of it. And they further said, that the prejudice that might be sustained by the remainder-man, by reason of injury to the land, was the strong objection to such a clause: that the tenant might, by a course of husbandry adapted to that purpose, exhaust the land, and surrender his lease when the land was so exhausted (*y*): and that it could not be held that the power was well executed by the lease for three lives, and that the clause of surrender was a distinct and independent clause, which might be rejected, leaving the demise to stand without the clause of surrender, (according to *Adams v. Adams* (*z*) and that class of cases),

(*u*) Jack dem. *Wheatley v. Creed*,
2 Huds. & Br. 128, A.D. 1828.

(*x*) *Isherwood v. Oldknow*, 3 Mau.
& Selw. 382, was cited by the court.

(*y*) See L. C. B. Joy's remarks on

this reason in *Muskerry v. Chinnery*,
2 Sugd. Pow. 6th edit. Appendix, No.

19. p. 620. 626.

(*z*) Cowp. 651.

because the clause was incorporated with the demise, and must be considered as part of the consideration for the rent covenanted to be paid.

In the later case of *Muskerry v. Chinnery* (*a*), where a power was given to a tenant for life to lease all or any part or parts of the settled estate for any time or term of years, or lives, and with or without covenants for renewal, and in case of the determination of all or any of the aforesaid lease or leases respectively from time to time to make new or other leases thereof in manner aforesaid, and with or without any fine or fines as he should think fit; and the donee, in consideration of a sum of 2000*l.*, and a yearly rent of 150*l.*, made a lease under the power containing a clause empowering the lessee to quit and surrender the premises at the end of every year of the term upon giving six months' notice in writing; the court of Common Pleas in Ireland, in answer to a case submitted for their opinion by Lord Plunket, C., certified that the lease was not warranted by the power.

When the case afterwards came before Sir Edward Sugden, C., he said that he very early entertained an impression that the case was not satisfactorily decided in the court of Common Pleas; and that his own impression was that the lease was valid: that he was aware of what had been decided in Ireland upon the point; but he was bound to say that his opinion did not agree with those decisions on the abstract question, that a clause of surrender invalidated the lease, unless express words were inserted to exclude it: that, where the transaction was *bonâ fide*, and the terms of the power did not require the number of years to be absolute, he saw no reason for holding that a clause of surrender vitiated the lease: that many powers required that the term to be granted should be an absolute one, that is, not determinable; and that this was a powerful reason for not introducing the term into a power where the parties themselves had been silent: that in the case before the court, he considered that the objection

(*a*) *Muskerry v. Chinnery*, Lloyd & Goo. 185, temp. Sugd. C.

was entitled to very little weight, as the lessees had paid a large consideration; and that, with reference to the terms of the power, it was entitled to no weight whatever. And the Lord Chief Baron concurred in this opinion (*h*).

The case came again before Lord Plunket, C., on a rehearing; and he concurred in the decision of the Common Pleas, protesting at the same time against being supposed to adopt the opinion which had been expressed by Sir Edward Sugden on the effect of a clause of surrender in a lease under a power which did not expressly warrant such clause (*c*).

The case afterwards came before the House of Lords on appeal (*d*); whence, under some peculiar circumstances of mistake attending Sir Edward Sugden's decree, it was referred back to the court of Chancery in Ireland. A case was then submitted to the Irish court of Queen's Bench, and it was there certified by Bushe, C. J., Burton, and Perrin, Js., against the opinion of Crampton, J., that the lease was not warranted by the power (*e*).

The point has since been argued before six of the learned judges in this country, besides the late Lord Chief Justice of the court of Common Pleas (Tindal), on questions proposed to them by the House of Lords; and the judges came to a unanimous opinion, which was subsequently read to the house by Mr. Baron Alderson, that the liberty conferred on the lessee to surrender the lease on giving six months' notice did not affect its validity; and that the unlimited power of leasing given to the donee of the power was an answer to the objection. The house, however, pronounced no opinion at the time, and the case was afterwards postponed for further consideration *sine die*; since which no mention has been made of it (*f*).

Under a power of leasing for one or two lives, or for the

(*b*) See 2 Sugd. Pow. 6th edit. Appendix, No. 19. p. 620.

(*c*) Lloyd & Goo. 182. 201, temp. Plunk. C.

(*d*) *Nom. Sheehy v. Lord Muskerry*, Rob. & Macl. 493; S. C. 7 Cla. & Fin. 1;

2 Sugd. Pow. 362, 6th edit.

(*e*) *Muskerry v. Sheehy*, 2 Jebb & Sy. 300.

(*f*) Times Newspaper of Monday, 24th August, 1846.

term of thirty years, or for any other number or term of years determinable upon one or two lives, a lease for thirty years absolutely may be made, the repetition of the particle *for* disjoining and separating the sentence, and making so many distinct clauses. The word *for* in the clause *for the term of thirty years* would otherwise govern the whole sentence, which would have been penned in this manner, viz., for the term of thirty years or any number of years determinable, &c. ; or rather, for any term or number of years determinable on one or two lives ; for if such a construction were to be made, there would be no occasion for the words, “for the term of thirty years” (*g*).

It is the better opinion, as we have seen (*h*), that the enabling statute (*i*) authorises a lease for ninety-nine years determinable on three lives : and, hence, a power of leasing for three lives, or twenty-one years or under, or for any time or term of years, upon one, two, or three lives, or as tenant in tail in possession may do, authorises a lease of the like nature and duration, although in a case where the point arose (*k*), it was objected that the power did not warrant a demise for longer than twenty-one years determinable on three lives.

In the case of *Bayley v. Warburton* (*l*), a power was given to tenant for life to demise the premises for such term, with and under such conditions, rents, and reservations, in such manner to all intents as tenants in tail might do by statute 32 H. 8, for the term of one, two, or three lives, upon and under such reservations and rents, and in such manner as tenant in tail was enabled to do by that statute ; and it was contended that a lease made in pursuance of the power would not bind a remainder-man or reversioner. The Chief Baron doubted ; but it was argued, that, if such construction were to prevail, the power of leasing would be wholly insignificant,

(*g*) *Winter v. Loveday*, Com. 37, Rokeby, J., *dissent*. The same case is to be found in several other reports, which are enumerated in n. (*z*), p. 423, ante. And see Dampier's argument in

Roedem. Brune v. Prideaux, 10 East, 166.

(*h*) Ante, p. 75.

(*i*) 32 Hen. 8. c. 28.

(*k*) *Lutwich v. Piggot*, 3 Mod. 268.

(*l*) *Bayley v. Warburton*, Com. 494.

for the donee having but an estate for life, every lease beyond it must have continuance against the person in remainder, as she might have made a lease determinable on her own life without the power; and that the restrictions annexed to the power, requiring it to be made under such conditions, rents, &c., and in such manner as tenant in tail was enabled to make, did not necessarily import that it should be such in point of duration, but only that it should be attended with such circumstances as that act required in the execution of leases by tenant in tail. And of this opinion was Baron Comyns.

As the case of *Hele v. Greene* is noticed by Rolle in his Abridgment (*m*), it appears to have been decided that a power of leasing given to a tenant for life without specifying any term, would warrant a lease for a term exceeding his life; but, as the case is reported by Style (*n*), it appears that the court were divided in opinion; Rolle, C. J., and Jerman, J., maintaining that such a lease would be good, for otherwise the power of leasing would be nugatory; while Nicholas and Ask, Justices, held, that the tenant for life could only dispose of the estate during his life.

In the case of *Commons v. Marshall* (*o*), an estate was settled on one for life, with power to make leases of the premises for any term not exceeding thirty-one years, or three lives (*p*), to commence in possession, at the best improved rent, and it was held in the court of Exchequer in Ireland, that a lease for the lives of three persons and the longest liver of them, or for thirty-one years from the 1st of May then last, which should last longest, was a good execution of the power. The cause was then removed by a writ of error into the Exchequer

(*m*) *Hele v. Greene*, 2 Rol. Ab. 261. pl. 10.

(*n*) *Heale, or Hele, v. Greene*, Sty. 258. 275. 315.

(*o*) *Commons v. Marshall*, 7 Bro. P. C. 111; S. C. Toml. ed. vol. 6, p. 168. See also *Hosier, or Hozier, v. Powell*, 1 Longf. & Towns. 2; S. C. 3

Irish Law Rep. 395.

(*p*) According to the report of the case by Wallis, (Lessee of Lord Netterville *v. Marshall*, Wallis, by Lyne, 30,) it appears that the power was to make leases for three lives or thirty-one years in possession.

Chamber in Ireland, where the judgment of the court below was affirmed by the Lord Chancellor, in opposition to the opinion of L. C. J. Annaly; and the decision was finally affirmed, on appeal, by the House of Lords of Great Britain. It would appear that the courts of Exchequer and Exchequer Chamber considered the lease a good one for three lives and no longer. But, according to Lord Mansfield (*g*), the House of Lords, rejecting the words *three lives*, held the lease to be a good execution of the power for thirty-one years. It is observable, however, that his lordship, in referring to the lease, transposed the terms of the grant, by stating it to have been for thirty-one years or three lives whichever should last longest, whereas in fact it was for three lives or thirty-one years which should last longest.

In the later case of *Long v. Rankin* (*r*), where there was a power of leasing for any term or terms of years not exceeding thirty-one years, or a number of lives not exceeding three lives, it was held that a lease for the lives of three persons there named, or for and during the full term and space of thirty-one years, which lives or term of years should longest continue, was good, and operated to limit the premises for the natural lives of the three persons therein named, and the survivor of them; and in case all the three persons should die within the period of thirty-one years, then for the remainder of a term of thirty-one years, to commence and be computed from the date of the indenture.

So, a power of leasing for three lives will authorise a lease for three lives and the lives and life of the survivors and survivor (*s*). The lives, however, must be in esse (*t*), certain and co-existing (*u*).

Where a person had a power of leasing for ninety-nine years, to be determined on the death of one, two, or three

(*g*) In *Earl of Darlington v. Pulteney*, Cowp. 260. 268.

(*r*) *Long v. Rankin*, Sugd. Pow. 6th edit. vol. 2, p. 539. Appendix, No. 2.

(*s*) *Alsop v. Pine*, 3 Keb. 44.

(*t*) Per Windham, J., *Arg?* in *Snow*

v. Cutler, T. Raym. 163. Comyns, *Arg?* in *Coventry v. Coventry*, Com. 315. *Clark v. Smith*, 9 Cl. & Fin. 126. 141.

(*u*) *Doe dem. Wyndham v. Halcombe*, 7 Term Rep. 713.

lives, it was held, that he could not demise the premises for ninety-nine years if A. B. should so long live, and make the term to commence from and immediately after the deaths of L. and R., two individuals on whose deaths a subsisting term of years was determinable (*v*). It was argued that this was not a lease in reversion, but was in effect a present lease for ninety-nine years determinable on three lives; for it was to depend on the existence of three lives in being, and could not exceed it, and so no greater charge on the reversion than the power warranted; but the court determined, that the lease in question was no more than a grant of an interest to be postponed to a future time; particularly as the prior term might by possibility be expended before the lives of L. and R.; and that it certainly was not the intention of the devisor that the tenant for life should have power to postpone the grant of an interest to so distant a period, but only that he should incumber the estate to the extent of a term for ninety-nine years determinable on three lives. It appeared that the lessor died before the prior lives dropped, and that the lease, therefore, must have taken effect, if at all, after his death; but this was not considered important; for in *Doe v. Oxenham* (*x*), which stood next in the paper for argument, the lease was for ninety-nine years, if two lives therein named should so long live, to commence from the death of T. S., who died in the lessor's lifetime; and the court said that this made no difference in effect, and gave judgment for the plaintiff.

Where a settlement of lands held under a lease for lives renewable for ever gave a power to the tenant for life to demise the same for any term or terms consistent with the estate or term for which the said lands should be then held, it was held, that the power authorised the grant of a lease for three lives different from the lives in the head lease (*y*).

Whether such a power would authorise a demise for three

(*v*) *Doe dem. Coplestone v. Hiern*, 5 Selw. 46.
Mau. & Selw. 40.

(*y*) *Hackett v. Hobart, Jones*, Irish

(*x*) *Doe v. Oxenham*, 5 Mau. & Exch. 288.

lives with a covenant for perpetual renewal was considered doubtful (*z*).

If a man having a power of leasing for any term of years not exceeding 100, demise the land without expressing the term, the lease will be void for uncertainty; for there is no more reason that it should be for the greatest than for the least term he could grant; or, indeed, for any other term under 100 (*a*).

A power of leasing for a certain term authorises a lease for a shorter period, the maxim being, *omne majus continet in se minus*; unless it plainly appear that the donor intended the exact term mentioned, and no other, to be granted. And, therefore, unless a contrary intention appear, under a power of leasing for twenty-one years, a lease for any less term may be granted; as may a lease for two lives, or one life, under a power of leasing for three lives (*b*); the less interest, however, must be of the same kind as the greater; a chattel, if a chattel interest only be authorised by the power; a freehold, if a freehold (*c*).

If the power be a particular power affirmative to lease for a specified term, such as twenty-one years, a lease exceeding the limit prescribed cannot be sustained at law, even for the term authorised by the power (*d*); but it would seem that if the power were a general one restrained by a negative, as to lease for any number of years not exceeding twenty-one, a lease for twenty-two years would stand good for the twenty-one (*e*). And it was said by Cheshire, Serjeant, in argument (*f*), that if a power were given to make leases for twenty-one years, if the person who was to execute such power made a

(*z*) Ibid. And see *O. Brien v. Grierson*, 2 Ball & Beat, 323. Jack dem. *Wheatley v. Creed*, 2 Huds. & Br. 128. And post, p. 438.

(*a*) *Bedell v. Constable*, Vaugh. 185.

(*b*) *Isherwood v. Oldknow*, 3 Mau. & Selw. 382. *Harris v. Bessie*, 1 Keb. 347. *Breers v. Boulton*, 3 Keb. 715. *Mayor of London v. Tench*, Ca. temp. Hardw. by Ridgew. 2; S. C. 2 Barnard.

K. B. 333. *Berry v. White*, O. Bridgm. by Bann. 91.

(*c*) *Isherwood v. Oldknow*, 3 Mau. & Selw. 401.

(*d*) *Campbell v. Leach*, Amb. 740. *Jenkins v. Kemishe*, Hardr. 395. 398.

(*e*) Per Holt, C. J., in *Smartle v. Penhallow*, 2 Ld. Raym. 994. 1000.

(*f*) *Peters v. Masham*, Fitzgib. 156-7.

lease for twenty-one years, and by the same deed limited a further interest in this manner, viz.: "and from and after the term aforesaid for one year more," the power would be well executed by the first limitation, and the excess would be surplusage not to be regarded.

We have seen that a power of leasing for any term or number of years not exceeding one-and-twenty years, or for the life or lives of any one, two, or three, person or persons, so as no greater estate than for three lives be at any one time in being in any part of the premises, will not authorise a lease for ninety-nine years determinable on lives; and that such a lease will not be good at law even for the twenty-one years determinable on the lives named (*g*).

In like manner, where, under a power of leasing in possession, and not in reversion, the donee demised the premises, to hold, as to part from a day past, and as to the residue from a future day, at an entire rent, the lease was held to be void for the whole. It was urged that the execution of the power might be good in part, so far as it was warranted by the power, though void for the excess; but the court determined that this was not a case of excess: that in such cases by retrenching the excess, a lease might be brought within the terms of the power; but that no limitation of the term would make a lease in reversion a lease in possession (*h*).

But where the lease would be void at law on the ground of excess, yet, if the line between the boundary of the power and the excess of its execution be clear and distinguishable, a court of equity, by vitiating the excess, will establish the lease to the extent sanctioned by the power (*i*). As if a party with a power of leasing for twenty-one years, lease for forty, the lease will be good in equity for the twenty-one; or if a party

(*g*) *Roe dem. Brune v. Prideaux*, 10 East, 158.

(*h*) *Doe dem. Allen v. Calvert*, 2 East, 376.

(*i*) *Campbell v. Leach*, Ambl. 740. 747. *Pawcy v. Bowen*, 1 Ca. in Ch. 23; S. C., nom. *Parry v. Bowen*, 3

Rep. in Ch. 11; 1 Eq. Ca. Ab. 342. pl. 1; Nels. 87; S. C., nom. *Parry v. Brown*, Freem. 171. *Alexander v. Alexander*, 2 Ves. 640. 644. Case of the *Queensbury Leases*, 1 Bli. P. C. 437. Anon. Freem. Ch. 224, case 296.

with a power of leasing for lives lease for ninety-nine years if one shall so long live, the lease will be good in equity for the life of the cestui que vie (*k*), unless the term expire before his death (*l*); for in each of these cases the excess is distinctly ascertainable.

In a late case in Ireland (*m*), certain leaseholds for lives, perpetually renewable, were settled on one for life, "with the usual leasing power for three lives or thirty-one years in possession, and not in reversion." A lease was made for three lives therein named, and for and during the life and lives of such other person and persons as should or might at any time thereafter be added or inserted to the time and term of the demise pursuant to the covenant for renewal thereafter contained; and the lessor covenanted, upon the fall of any of the lives therein named, or thereafter to be named, to make a new lease for the remaining life or lives, and for the life or lives of such other person or persons as the lessee his heirs or assigns should nominate, at the like rent, &c. It was contended that the covenant for renewal vitiated the lease. The case was decided on another point; but the court said that they were not satisfied that the arguments urged against the validity of the lease were well founded.

But in the subsequent case of *Clark v. Smith* (*n*), which also originated in Ireland, a lease of this description was wholly set aside. A party seised and possessed of lands in Ireland, some of which were held under a fee-farm grant; some in fee; and some for long terms of years; some (called Tubrid) on lives with a covenant for perpetual renewal; and others on lives without any covenant for renewal; settled them, on the occasion of his marriage, to the use of himself for life, with remainders over; and by the settlement it was declared, that it should be lawful for the settlor, and all other persons to whom any use or estate was thereby limited, to lease the lands and premises, or any part thereof, to any person or persons for

(*k*) Ibid.

2 Huds. & Br. 128.

(*l*) Ibid.

(*n*) *Clark v. Smith*, 9 Cl. & Fin.

(*m*) *Jack dem. Wheatley v. Creed*,

126.

any term or number of lives or years consistent with their respective interests therein, to commence in possession, and not in reversion, remainder, or expectancy; and so as in every such lease the best and most improved yearly rent should be reserved and made payable, without taking any sum or sums of money or other thing by way of fine for the making of any such lease or leases. By virtue of this power, the settlor demised the lands called Tubrid for the lives of A., B., and C., (different from those in the instrument under which he held,) and of all and every such other person and persons as by virtue of the lease and the covenant for perpetual renewal therein contained should be added to the term thereof; and the settlor covenanted for himself, his heirs and assigns, with the lessee, his heirs and assigns, (in effect,) that, upon the death or failure of the aforesaid lives of A., B., and C., or any of them, which should first happen, and upon the lessee's paying, within six calendar months next after the failure of such life, to the settlor, his heirs or assigns, the sum of 5*l.* sterling as a fine for each and every life which should happen to die, and nominating a new life, he the settlor, his heirs or assigns, would add the life of such other person so nominated in the place of the person so happening first to die; and in like manner from time to time successively for ever, upon the failure of every other life or lives in the lease nominated, or thereafter to be successively nominated, and upon the like payment of 5*l.* sterling as a fine upon the nomination of each and every life; it being the true intent and meaning of the parties that the lessee, his heirs and assigns, should, on the terms aforesaid, have a lease for three lives renewable for ever of the premises in being, on paying unto the settlor, his heirs or assigns, 5*l.* sterling for each and every renewal. On a case being sent from the court of Chancery in Ireland to the court of Common Pleas, the latter certified that the lease and covenant for perpetual renewal were warranted by the power (o); but, as usual, without assigning their reasons

(o) *Smith v. Clarke, Smythe*, 367; S. C. 2 Irish Law Rep. 78.205.

for the determination; and the court of Chancery decreed a specific performance of the covenant for renewal against a remainder-man claiming under the settlement, who thereupon appealed to the House of Lords, where the decree was reversed, and the plaintiff's bill below dismissed with costs; 1st, because the attempt to extend the estate of the lessee for lives to be named after the death of non-existing lives was not within the power, and as the tenant for life could not have created such an estate, the remainder-man could not be bound to give effect to a covenant for that purpose; 2ndly, because the power did not authorise leases in reversion; and, 3rdly, because the taking of fines was prohibited.

If, instead of a lease for twenty-one years, or three lives, a lease for seventy years be taken, there is no principle for reforming it in the middle of the term, by making it a lease for three lives, to be determinable upon any life then to be named. The lives might be gone long before; and the court can never act with safety in executing such a proposal (*p*).

And in the case of an agreement, unless fraud form an ingredient in the transaction, it may be stated as a general rule, that if a tenant for life with power of leasing agree to grant a lease for a longer period than is warranted by the power, the court will compel him to execute such a lease as the power enables him to grant (*q*). If, however, the conduct of the plaintiff be such as to raise suspicions of the fairness of the transaction, the court will refuse a specific performance, and leave him to his remedy at law (*r*).

By an act passed in the 12th year of the reign of Queen Anne, the Bishop of Durham was authorised to grant certain lands to the vicar of Stockton. The vicar, of course, was enabled to grant only such leases as the law allowed to a vicar (*s*); another act was therefore passed in the 1st year of George 1st, reciting that the land might be let for a consi-

(*p*) Per Lord Eldon in the *Attorney-General v. Griffith*, 13 Ves. 576-7.

(*q*) *Byrne v. Acton*, 2 Bro. P. C. 390; S. C. Toml. ed. vol. 1, p. 186.

(*r*) *O'Rourke v. Percival*, 2 Ball & Beat. 58. *Harnett v. Yeilding*, 2 Scho. & Lef. 543, 560.

(*s*) As to this, see ante, p. 238, *et seq.*

derable yearly rent if the lessees or persons farming the same might have a certain term and interest therein for a sufficient number of years for their encouragement to build upon and improve the same, but that there being no power given by the former act to the vicar, or to any other person, to grant or demise the premises, they had ever since the making of the act lain waste, and very little advantage could be made of them without some power of granting leases; for remedying which inconvenience, and for the more effectually providing and securing to the vicar and his successors the benefit and augmentations intended by the former act, it was enacted, that it should be lawful for the vicar for the time being, with the consent of the vestrymen of the parish for the time being, or the major part of them, to grant or demise the lands in question to any person or persons whomsoever for such term or number of years, at and under such rents, reservations, or payments, as to him and them should seem meet, provided that the yearly rent should be the highest that could be got, and that no fine should be taken for the making of any such grant or demise, and that in case of any difficulty arising between the vicar and vestrymen about letting to farm the waste grounds aforesaid, the matter in dispute should be referred to be determined by the Bishop of Durham for the time being. In consequence of this power, various leases were granted for 999 years, at rents making together an increase in the vicar's income of about 50*l.* per annum. An information was filed, contending that the leases ought to be cut down, on the principles applying to charity estates; and it was argued, that the vestrymen were to be considered in the nature of trustees, and, therefore, that the leases were to be treated as if made by trustees of a charity (*t*). But Lord Eldon said that he found it difficult to accede to that reasoning, for when the legislature, with respect to ecclesiastical persons, had said that they may make such leases as to them should seem meet, it was difficult for a court of equity, at the distance of 100 years, to say what were the terms on which

(*t*) As to which, see ante, p. 347.

such leases should have been granted, particularly when the premises were to be improved in the manner in which these were; and, therefore, notwithstanding he was of opinion that the act gave a power beyond what was intended, yet he did not think that a court of equity had a right to cut down leases that were within the express terms of it (*u*).

The power usually provides not only for the duration of the term, but also specifies whether the donee is to be confined to the granting of leases in possession, or allowed to grant in reversion. Where it is intended to confer a power of leasing in possession only, the form, in general, after authorising leases in possession, expressly negatives a right to lease in reversion; as, "to take effect in possession, and not in reversion or remainder or by way of future interest." The option of leasing in possession or reversion is sometimes given; and occasionally the power is silent as to the period at which the term is to take effect.

The subject, therefore, may be considered under the three following sub-divisions :

1st. With reference to powers that simply authorise the grant of leases in possession; or authorise leases in possession, and contain also terms prohibiting the grant of leases in reversion.

2ndly. With reference to powers that authorise the grant of leases in possession or reversion. And,

3rdly. With reference to powers that authorise the grant of leases generally; but are silent as to the period of commencement.

And, to pursue it with advantage, we must anticipate the distinctions noticed in a later part of this work (*v*), between, Leases in possession; Leases in reversion; Reversionary leases; Leases of the reversion; and Concurrent leases.

A lease in possession confers at common law a present right of present enjoyment, and becomes perfect in point

(*u*) *Attorney-General v. Wray*, Jac. 307. *Attorney-General v. Moses*, 2 Muhl. 294. See also *Boylard v. War-*

ner, 1 Hay. & Jo. 79.

(*v*) *Post*, in the Chapter on the Habendum.

of estate by the entry of the lessee: though where the lease is granted by virtue of a power, the necessity for entry is superseded by the statute of uses (*x*).

A lease in reversion, in its most ample sense, signifies a lease to commence at a future day, and is then opposed to a lease in possession; for every lease that is not a lease in possession, in this sense is said to be a lease in reversion (*y*). In technical strictness, however, and particularly in powers, the term "lease in reversion," signifies a lease to commence after the expiration of a present interest in being (*z*).

According to Holt, C.J., a lease for life under a power of leasing cannot be made to commence at a future day; and he said that for that reason the very same expression ("lease in reversion") would have a different signification in the same conveyance; meaning, when applied to a lease for life, a concurrent lease, or a lease of the reversion, viz., a lease of land at the same time under demise, not commencing after the end of that demise, but having a present commencement, and concurrent with the prior demise; when applied to a lease for years, meaning a lease to take effect after the expiration or determination of a lease in being (*a*).

In Whitlock's case (*b*) also it is laid down, that a lease for lives could not be made in reversion, though a lease for years determinable on lives might. And the same doctrine was advanced by the court in the more modern case of *Roe v. Prideaux* (*c*); because the estate must be to take effect *in futuro*, and a freehold lease could not be conveyed unless it were to take effect *in presenti*.

Now, although it is well established that a freehold interest cannot be created at common law to commence *in futuro*; yet nothing can be clearer than that a freehold interest may be made to commence *in futuro* under the statute of uses.

(*x*) 27 Hen. 8. c. 10.

(*y*) Per Holt, C. J., in *Winter v. Loveday*, Com. 39. This case is reported by various persons, see ante, p. 423. n. (*z*). *Lyn v. Wyn*, O. Bridgm. by Baun, 122. 131.

(*z*) Ibid. Doe dem. *Allan v. Cal-*

vert, 2 East, 376. 383.

(*a*) Com. 39. See also Holt, 415; Carth. 429.

(*b*) Whitlock's case, 8 Co. 69, b. 70, b.

(*c*) Roe dem. *Brune v. Prideaux*, 10 East, 158. 185.

Why a freehold interest conferred under a power of leasing should be an exception from the general rule has not been explained. The law, however, as it is expounded in the cases cited seems to have been generally received without inquiry into the principle on which it is founded.

A lease to commence at a future day, independently of any existing interest, though included in the comprehensive expression "lease in reversion", is more correctly denominated "a reversionary lease"; or "a lease *in futuro*"; and confers an *interesse termini* on the lessee until the period pointed out for its commencement in possession (*d*).

A lease of the reversion is such as is granted during the continuance of an existing term, and is concurrent with it in point of interest; and, in ordinary cases (*e*), confers on the lessee a vested interest, and a right to the rent reserved under the prior lease. But,

A lease may be concurrent with an existing one merely in point of computation of time, with reference to duration, without conferring on the second lessee anything more than an *interesse termini* during the continuance of the first lease; as in the case of a second lease for years being granted to commence in possession at the expiration of a prior one, and to be thenceforth held for a term of years to be computed from a day preceding the determination of the prior lease.

We may now address ourselves,

1st, to leases under powers that authorise leases in possession; or authorise leases in possession and contain terms prohibiting grants in reversion.

On this branch of the subject little or no difficulty presents itself; for it is incontrovertibly settled that a power of leasing in possession, or in possession and not in reversion, will not, at law, authorise a lease in reversion, although the estate were in lease at the time of the creation of the power (*f*).

(*d*) 2 Prest. Conv. 146.

(*f*) *Opy v. Thomasius*, 1 Lev. 167;

(*e*) See post, *Habendum*. But, as to leases under powers, see post, p. 147.

S. C., nom. *Opey v. Thomasius*, T. Raym. 132; S. C., nom. *Opee v. Tho-*

And if the lease be made to commence *in futuro*, it is immaterial whether the interval between the execution of the deed and its commencement in interest be of long or short duration, as a day will prove as fatal as a year or any longer period (*g*).

In the case of *Fox v. Prickwood* (*h*), it appeared that one being seised in fee made a lease for life, and afterwards levied a fine to J. S. for fifteen years, remainder to himself for life, with a power to make leases for twenty-one years or three lives in possession; and the question was, whether he might grant a lease during the first fifteen years (*i*), or whether the exercise of the power was suspended until the determination of that term. The court were clearly of opinion that he might lease presently in possession, but not in reversion; and that, as the term of fifteen years was subject to the power, he was not bound to wait until the remainder vested in him in possession: it was held, however, that the owner of the fifteen years should have the rent reserved during his term.

Even the usage of the country to grant leases of particular kinds of lands, as arable, or pasture, to commence at different periods, will not justify a lease in reversion where leases in possession are required by the power (*k*). Thus, a lease executed, under such a power, on the 29th of March, with an habendum, as to the tillage ground from the 13th of February then last past; the pasture ground from the 5th of April then next; and the residue of all the premises from the 12th of

masius, but almost unintelligibly reported, 1 Sid. 261; S. C., nom. *Opie v. Thomatius*, 1 Keb. 773. 910; cited by Dolben, J., 4 Mod. 6. *Marquis of Antrim v. Duke of Buckingham*, 1 Ch. Ca. 17; S. C. 1 Sid. 101; Freem. 168; O. Bridgm. by Bann. 617, Appendix, G. *Fox v. Prickwood*, 2 Bulstr. 216; S. C. Cro. Jac. 347, (marked 349 in folio edit. by mistake); 1 Rol. 12; 2 Rol. Ab. 260. pl. 5. *Pollard v. Greenvil*, 1 Ch. Ca. 10; S. C. 1 Rep. in Ch. 93; 1 Eq. Ca. Ab. 342. pl. 2. *Bowes v.*

East London Waterworks Company, 3 Madd. 375; S. C., on appeal, Jacob, 324. And see *Doe dem. Pulteney v. Lady Cavan*, 5 Term Rep. 567; S. C., in error, 6 Bro. P. C. 175, Toml. ed.

(*g*) *Bowes v. East London Waterworks Company*, sup.

(*h*) *Fox v. Prickwood*, sup.

(*i*) It is stated in *Rolle's Report* of the case, that the original lease for life had expired.

(*k*) *Doe dem. Allan v. Calvert*, 2 East, 376.

May also then next, being the usual periods of entry by tenants on arable and meadow ground respectively in the country where the lands in question lay, at an entire rent, was held void, as being directly in opposition to the terms of the power, which, it was said, if the custom were engrafted on it, instead of being to make leases in possession, would be to lease in reversion, so as the commencement of the lease, as to part, should not be carried beyond the 5th of April; and, as to the other part, not beyond the 12th of May next following the lease.

The existence of a tenancy at will, or from year to year, forms no obstacle to the exercise of a power to grant leases in possession, but not by way of reversion or future interest, if at the time of making the lease the lessor direct the occupiers to pay their rent to the lessee, which they accordingly do (*l*).

But a lease void at law on the ground of its being granted in reversion, instead of in possession, may sometimes be supported in equity in favor of persons claiming for a valuable consideration. Thus, where a tenant for life, with a power of leasing certain mines in possession, made a second lease during the existence of a former one to only one of the two lessees entitled under the former, and, after the execution of the second lease, the lessees worked the mines, and expended considerable sums of money in building smelting mills, &c., upon the spot, the court, in order to support the contract, presumed the surrender of the former lease, and held that, as the new lease was acted under, it should be supported in equity, notwithstanding its invalidity at law (*m*).

Equity will also lend its aid where there is only a meritorious consideration, as in the case of the lease being granted by way of provision for a child (*n*).

So, where a man made a voluntary settlement on his son for life, and after to his first and other sons in tail, with

(*l*) *Goodtitle* dem. *Clarges v. Fumman*, 2 Dougl. 565. *Ren* dem. *Hall v. Bulkeley*, 1 Dougl. 292.

(*m*) *Campbell v. Leach*, Amb. 740.
(*n*) *Anon.* 2 Freem. Ch. 224.

power for the son to make a lease in possession for ninety-nine years determinable on three lives, and also to make leases, to commence after his death, if he had issue male, to continue so long as he had issue male; and the son made a lease to his father, in trust for one of his younger children, but the lease was not pursuant to the power, it was decreed good, and taken to be as a lease made by the father after a voluntary settlement (*o*).

But it appears that a power created by act of parliament must be strictly pursued, and if void at law, equity cannot afford relief (*p*).

If a power be granted to tenant for life to lease in possession, an agreement for a lease to commence at a future day is not void as a lease in reversion, but will bind the remainderman, if the tenant for life outlive the day appointed for the commencement of the term. It is a contract, and every contract must necessarily precede the execution of the lease (*q*).

Though a lease *in futuro* cannot be granted at law by virtue of a power to lease in possession; it may be doubted whether a concurrent lease, commencing *in presenti*, may not; provided the term do not exceed that authorised by the power. The cases cited below (*r*) appear to warrant such a lease. And Mr. Coote, in his late work on the Law of Landlord and Tenant, adopts the same conclusion (*s*).

But Sir Edward Sugden is decidedly opposed to the validity of concurrent leases (*t*). After a critical examination of the

(*o*) Gooding *v.* Gooding, 1 Eq. Ca. Ab. 342. pl. 3. See also Marquis of Antrim *v.* Duke of Buckingham, O. Bridgm. by Bann. 617, Appendix, G.; S. C. 1 Ch. Ca. 17; Freem. 168; 1 Sid. 101. Pollard *v.* Greenvil, 1 Ch. Ca. 10; S. C. 1 Rep. in Ch. 98; 2nd ed. 184; 1 Eq. Ca. Ab. 342. pl. 2.

(*p*) Anon. Freem. Ch. 224.

(*q*) Shaanon *v.* Bradstreet, 1 Scho. & Lef. 52. Dowell *v.* Dew, 1 Yo. & Col. V. C. 345.

(*r*) Read *v.* Nashe, 1 Leon. 147; S. C. O. Bridgm. by Bann. 606, Appen-

dix, F. Berry *v.* White, O. Bridgm. by Bann. 82, semb. S. C. cited, nom. Berry *v.* Riche, Hardr. 412. Goodtitle dem. Clarges *v.* Funucan, 2 Dougl. 565, 1st point. Doe dem. Allan *v.* Calvert, 2 East, 376. 384. Roe dem. Brune *v.* Prideaux, 10 East, 158. 185. And see Fox *v.* Collyer, 1 And. 65; S. C. Mo. 107. Sands *v.* Ledger, 2 Ld. Raym. 1792.

(*s*) Coote's L. and T. 189. 191.

(*t*) Sugd. Pow. 6th edit. vol. 2, p. 397, *et seq.*

cases, he says (*u*), "Upon the whole, then, the point has never been decided, and is not surrounded by much authority; and there seems reason to suppose, that, if it should ever be argued on its true principles, the decision will be that a concurrent lease cannot be granted. To guard against a contrary determination, it might be advisable in powers of leasing to expressly declare that a concurrent lease shall not be granted. The common power would then run thus:—'for so many years in possession, and not by way of reversion, or future or concurrent interest.' " And he adds (*x*), that "although a concurrent lease cannot be made, yet a surrender may be taken of the old lease, and a new one granted. If the new lease be made to the old tenant, an express surrender is of course unnecessary; and it is no objection that the tenant for life obtains an increased rent; of course the lease would be void if the increased was not the proper rent."

One of the chief objections to a concurrent lease arises out of the difficulties attendant on a reservation of, and right to, the different rents. This objection has been strongly urged by Sir Edward Sugden. He says, that, where the power authorises it, a chattel lease may be granted pending a prior subsisting one, provided it gives no beneficial interest during the continuance of the subsisting lease, (10 East, 184); and this, in speaking of chattel leases, is what is properly called a *concurrent lease*. Where there is either a lease for lives or a lease for years in being, of course the lessor may grant or demise the reversion, so as to entitle the grantee or lessee to the immediate benefit of the existing lease; but this is an operation never within the view of ordinary powers of leasing, the object of which is to secure the rents for the persons entitled to the reversion under the settlement creating the power, and not to constitute a new lessor (*y*). And in a subsequent page (*z*) he says, that the advantage to be derived from the two rents, which was relied on in *Fox v. Collier's*

(*u*) Ibid. p. 410.

(*x*) Ibid. p. 411.

(*y*) Sugd. Pow. 6th edit. vol. 2, p. 370.

(*z*) Page 404.

case (a) is no other than a fruitful field of litigation. If the second lessee should enter and be ousted, as of course he would be, the rent on the second lease would, it should seem, be suspended. Or it may be thought that, as at this day leases are made by deed, the second lease would take effect by estoppel as a lease in possession, and, attornment being now unnecessary, would carry with it the right to the rent reserved by the first lease, and then the remainder-man's remedy for his rent would be more complicated and less effectual than it would be under a single lease. And again he says (b):—Where the best rent is required by the power, if a concurrent lease is granted, and the value has risen since the first lease, it would at all events be necessary to reserve the best, and, therefore, a larger rent; and so if the value had fallen in the interim, a less rent might be reserved. The reservation of two different rents for the same period, particularly as the larger one in the first case could not be recovered in the way contemplated by the power, if at all, during the continuance of the first lease, would clearly show that such a lease could not be sustained as a due execution of the usual power of leasing.

Without attempting to answer these arguments, I may refer to Mr. Chance's remarks on the subject in his work on the Law of Powers. He says:—Upon the whole, it would seem extremely difficult, if not impossible, to support a concurrent lease under the common power of leasing in possession at rack-rent, whatever may be the case with other powers; and whether any distinction could be raised where the outstanding interests are not binding on the remainder-man, appears at least very questionable. If a concurrent lease can, under such a power, be supported at all, it must perhaps be in this view;—that the new lease carries no reversion or rent; that the limitation of the new term, so far as it is concurrent with that in the old lease, is a perfect nullity; that in fact the new lease amounts to nothing more than an

(a) See ante, p. 245.

(b) Page 409.

appointment to take effect from the determination of the old lease for so many years of the term authorised by the power as shall then remain, the term taking effect for the purposes of computation, but not by way of interest, from the execution of the lease. If so, of course the result is this,—that a lease in futuro may be created, provided the term as computed from the date of the lease, does not exceed the term authorised by the power (c).

As a deed takes effect from its delivery and not from its date, it follows, that a power of leasing in possession, and not in reversion, is well exercised by a lease containing an habendum from a future day, if the execution of the deed be deferred until after that day (d). And parol evidence is admissible to prove the time of execution (e).

For a long time a question depended whether the word *from* in the limitation of a term under a power of leasing in possession, was inclusive or exclusive of the day of the appointment. The refined distinctions taken upon the terms “from the date;” “from the day of the date;” “from the time of the making;” “thenceforth,” and the like, were a source of constant litigation, and, it is to be feared, afforded in too many cases the means of eluding a disadvantageous contract. Nor was it until Lord Mansfield’s time that all doubt upon the point was dispelled by the case of *Pugh v. the Duke of Leeds* (f), which determined, that the words “from the day of the date,” and similar terms, should receive such a construction as would support and not defeat the deed in which they were used. It will be unnecessary further to notice in this place the particular cases bearing on the subject, as they will be discussed in another page (g).

2ndly, As to leases under powers that authorise the grant of leases in possession or reversion.

(c) Chance on Powers, vol. 2, p. 300.

(d) Doe dem. Cox v. Day, 10 East, 427. Freeman dem. Vernon v. West, 2 Wils. 165. Doe dem. Mount v. Roberts, 4 Dougl. 306. Steele v. Mart, 4 Barn. & Cres. 272; S. C. 6 Dow. &

Ry. 392. Campbell v. Leach, Ambler 740.

(e) Doe dem. Cox v. Day, sup. Doe dem. Reece v. Robson, 15 East, 32.

(f) Pugh v. The Duke of Leeds, Cowp. 714.

(g) Post, as to the Habendum.

Under a power of this kind, the donee cannot make one lease in possession and another in reversion of the same land; but his power of leasing in reversion will be confined to such land as was not in the possession of the donor of the power at the time of its creation; and, therefore, if, by the determination of the then existing lease, the donee once lease in possession, he can never after make a lease in reversion; for he has an election to do one or the other, but not both (*h*). And if the premises, being in possession at the creation of the power, be afterwards demised, it seems that a lease in reversion cannot be maintained; though C. J. Holt said he would not declare his opinion of that, because it did not come judicially before him (*i*).

Where there was a power of leasing for any term or terms of years, or life or lives, so as such estate and term should not exceed the number of twenty-one years or three lives in possession and remainder; or for any number of years determinable upon one, two, or three lives at the most; and the donee leased the premises to R. S. for ninety-nine years, if he should so long live, to begin after the determination of a term created previously to the power, and of which term ten years were then unexpired; the court held the power to be well exercised. They agreed that a lease for one life and ten years would not be within the power; for the estate must be such as would not exceed three lives or twenty-one years, in the disjunctive, and the ten years and a life might exceed three lives or twenty-one years; but that, as the *ita quod*, or *so as*, reached not to the estates of the land, but to the estates by virtue of the power, and was therefore inapplicable to the then existing lease, the lease in question did not exceed the term allowed (*k*). They considered the point ruled and determined by Whitlock's case (*l*).

It is observable, that the court construed the word *remainder*

(*h*) Winter v. Loveden, 1 Ld. Raym. 267. 269.

Bann. 99. 100.

(*i*) 1 Ld. Raym. 269.

(*l*) Whitlock's case, 8 Co. 69, b.;

S. C. 1 Brownl. 169.

(*k*) Berry v. White, O. Bridgm. by

to signify the same as *reversion*; and the word *and*, in the words *possession and remainder*, to signify *or*, in the disjunctive; for otherwise, it was said, no estate could be made in possession alone (*m*).

One of the objections mainly urged in the case of *Berry v. White*, just cited, was, that if the donee of the power might make leases also in reversion or remainder, he, or those who came to have the power after him, might likewise make leases in reversion or remainder; and so lease might be made upon lease in *infinitum*, so as every lease exceeded not three lives, or twenty-one years; and there might be many leases of twenty-one years after twenty-one years, or many leases determinable upon three lives, every one of several men's lives; and so, in effect, destroy the interest of those others in remainder (*n*). Bridgman, C. J., however, conceived that he who, by virtue of the power, had made such a lease in reversion or remainder, as long as that continued but a reversion or remainder, could not make another lease in reversion or remainder upon it, if it, together with all the estates in possession and remainder made before by virtue of the power, should exceed the number of twenty years (*o*), or three lives, in possession or remainder; for that was the *terminus ultra quem* they could not go by virtue of the power; and that the words, "so as such estate and term (in the singular number) exceed not twenty-one years or three lives in possession or remainder," must be taken collectively for such estate and terms (in the plural number); for so were the words precedent, "any term or terms"; and, secondly, that "estate in possession and remainder" could not properly be understood but of two estates; and, therefore, that, in a reasonable construction, the power might be construed to be confined, not to be executed beyond twenty-one years or three lives in the whole, both in possession and remainder (*p*).

But where tenant for life with a power of leasing "for any

(*m*) O. Bridgm. by Bann. 100.

(*n*) O. Bridgm. by Bann. 101.

(*o*) So in report. Qy. 21 years?

(*p*) O. Bridgm. by Bann. 101-2.

term or number of years, not exceeding the term or space of ninety-nine years from the date of executing such lease, and so as every such lease or leases should be made to take effect either in possession or immediately after the determination of the leases then subsisting thereof respectively", by lease, dated 29th May, 1787, demised the premises for thirty years from the 10th October, 1791, on which day several existing leases of the same premises would expire; and by another lease, dated 4th June, 1787, but in fact agreed for under the same bargain, and at the same time, as the lease of 29th May, 1787, and in pursuance of which agreement both leases were executed at the same time, granted the same premises to the same person, to hold from the 10th October, 1821, for sixty-three years; it was held, that the second lease, being made under the same bargain, was an invalid execution of the power, although the whole interest comprised in the two leases did not exceed the term allowed by the power; for as the one lease was made to commence at the expiration of a lease then in being, and the other was not made to commence until a later period, it was clear that the latter was not a lease to take effect in possession, or immediately after the determination of the then subsisting lease. The court, however, said, that had the leases been made at different times, and in consequence of different bargains, the case might perhaps have been different; but on this point they did not think it necessary to express an opinion (*q*).

It appears that a power of leasing in possession or reversion will not warrant the grant of a lease to commence at Michaelmas next after the determination of a former lease, so as to leave an interval between the first and second lease (*r*).

A special power of leasing cannot be declared upon as a general power: for example, if the power be to lease for twenty-one years in possession, and not in reversion, rendering the ancient rent, and the lessee not to be dispunishable

(*q*) Doe dem. Sutton *v.* Harvey, 1 Barn. & Cres. 426; S. C. 2 Dow. & Ry. 589.

(*r*) Berry *v.* White, O. Bridgm. by Bann. 102.

for waste, it is a fatal variance to declare upon it as a power to the donee during his life to make leases for twenty-one years (*s*).

3rdly, As to leases under powers that authorise the grant of leases generally; but are silent as to the period of commencement.

It seems to be universally agreed, that, if the estate be not in lease at the creation of the power, a particular power affirmative of leasing for life or lives, for twenty-one years, or any other specified period, without providing for the time of commencement, will not warrant the grant of a lease to commence at a future day (*t*); unless it can be inferred that the donor of the power intended that a lease in reversion should be made (*u*); for the term "demise and lease" imports a present possession; and if the lease cannot be executed *in presenti*, it is hardly capable of the sense belonging to the expression "to demise and lease". Upon this principle, where a power was given to a tenant for life to grant, demise, set, and let, during his life, all or any part of the lands devised, for the term of ninety-nine years, to be determined on the death of one, two, or three lives; and in pursuance of the power he demised the premises for ninety-nine years, if E. H. should so long live, the said term to commence from and immediately after the death of J. L. and M. R. (*x*), who survived the donee of the power; it was held that the power was badly exercised, as the lease was no more than the grant of an interest to be postponed to a future time; and that, in consequence of the death of the lessor before the prior lives dropped, the lease must take effect, if at all, after his death; and, moreover, that as

(*s*) *Sands v. Ledger*, 2 Ld. Raym. 792.

(*t*) *Countess of Sussex v. Wroth*, Cro. Eliz. 5; S. C. 3 Leon. 136. *Berry v. White*, O. Bridgm. by Bann. 94. 96. Hardr. 412. *Winter v. Loveday*, Com. 37; S. C. ut sup. p. 423, n. (*z*). *Baynes v. Belson*, T. Raym. 247, 2nd point. *Slocomb v. Hawkins*, Yelv. 222; S. C. *Shecomb v. Hawkins*, Cro. Jac. 318;

1 Brownl. 148. 3 Salk. 276.

(*u*) *Doe dem. Copleston v. Hiern*, 5 Mau. & Selw. 40. And see Copley's argument in *Shaw v. Summers*, 3 J. B. Mo. 202-3.

(*x*) J. L. and M. R. were lives on which a subsisting term for years was determinable, though it was not so stated in the case.

the previously subsisting term might also by possibility be expended before the lives, it could not be the intention of the devisor that the tenant for life should have power to postpone the grant of an interest to so distant a period, but only that he should encumber the estate to the extent of a term for ninety-nine years determinable on three lives (*y*).

In *Doe v. Oxenham* (*z*), which stood next in the paper for argument, a lease was made under the same power for ninety-nine years, if two lives therein named should so long live, to commence from the death of T. S., who died in the lifetime of the lessor; but the court considered that this made no difference in effect, and gave judgment for the plaintiff.

The donee, therefore, after having made a lease in pursuance of his power, cannot during such lease grant another to begin at the expiration of the first; even though the first be but a partial exercise of the power, and the first and second together do not exceed the term allowed by it (*a*). A lease made to commence at a future day is alike void whether that day fall immediately after, or be totally independent of, a previously existing interest (*b*). The donee's right to grant leases to commence *in futuro* is not extended, though the power enable him to grant any lease *or leases*, or to lease for any term or terms (*c*).

These, it will be observed, are cases of particular powers affirmative; but whether the circumstance of the power being a general one restrained by a negative would make a difference is not quite clear.

As Anderson reports the case of *Harcourt v. Pole* (*d*), it was held, that a power of leasing for any number of years not exceeding the number of ninety-nine years from the time of the making of the demise authorised a lease for sixty years to commence twenty years after the making; for it did not

(*y*) *Doe dem. Copleston v. Hiern*, 5 Mau. & Selw. 40.

(*z*) *Doe v. Oxenham*, 5 Mau. & Selw. 46, n.

(*a*) *Shaw v. Sunnners*, 3 J. B. Mo. 196. This was not a case of a parti-

cular power affirmative.

(*b*) *Slocombe v. Hawkins*, sup.

(*c*) *Countess of Sussex v. Wroth*, sup. *Berry v. White*, O. Bridgm. by Bann. 96-7.

(*d*) *Harcourt v. Pole*, 1 And. 273.

exceed the number of ninety-nine years from the time of making the demise ; and that the sense of the power was the same as if it had been to make leases for ninety-nine years from the time of the making of the lease, or for any other term which did not exceed that number of years. But Bridgman (*e*) seemed to think that there was no ground for the difference. He said that the lease in reversion in Whitlock's case (*f*), though the power was of the same description, could not have been granted, had not the words "as well in possession as in reversion" been inserted.

The recent case of *Shaw v. Summers* (*g*) seems also opposed to *Harcourt v. Pole*. A power was given to trustees to let the premises in such parts and parcels, manner and form, and for such time and term not exceeding twenty-one years, as they should think proper; and it was held, that such a power authorised only a lease in possession, and not *in futuro*; and that, as the trustees had let the premises for ten years, and afterwards, and before the expiration of that term, relet them for eleven years to begin at a future day, the second lease was void, and a bad execution of the power, although the two terms together did not exceed twenty-one years.

But a distinction is said to exist where the premises were in lease at the creation of the power, and continue subject to the same lease at the time of exercising the power; and it is also said that a lease in reversion may be granted, though, as we shall see, the cases on which the assertion rests are too contradictory and unsatisfactory to justify a positive opinion. The inaccuracy of some of the early reports was never more evident than in the cases connected with this subject.

In the Marquis of Northampton's case (*h*), which is usually adduced as an authority in support of the distinction, it is observable that the reporters are not agreed upon the facts; in addition to which, its value as an authority is diminished

(*e*) O. Bridgm. by Bann. 96.

(*f*) 3 Co. 69, b.

(*g*) *Shaw v. Summers*, 3 J. B. Mo. 196.

(*h*) Marquis of Northampton's case,

3 Dy. 357. a.; S. C. 3 Leon. 71; 4 Leon. 17. In these two volumes of Leonard this case is reported with scarcely a verbal alteration. 2 Rol. Ab. 261. pl. 8.

by the circumstance of the judges not being unanimous. The case as reported by Dyer, is in these terms:—The husband and the wife, by their deed indented, dated in December, in the thirty-second year of Hen. 8, made a lease of certain parcels of the inheritance of the wife for the term of twenty-one years, rendering to them and to the heirs of the wife the accustomed rent. And afterwards, in 35 H. 8., it was enacted by parliament, that the husband should have and enjoy the lands in lease and the rent to himself only for the term of his life, remainder to his wife, and that all leases and grants thereof made and to be made by the husband, by indenture, for the term of twenty-one years, or less, reserving the accustomed rent to him for the term of his life, and after his decease to his wife and to her heirs, should be good and effectual during such term or terms. The husband after eight years of the said lease expired, (reciting the former lease,) demised and granted the said land for twenty-one years next after the end of the first twenty-one years, reserving the said usual rent by indenture according thereto. Whether this lease be good or not after the death of the wife and husband, quære. The argument depends upon the meaning of the makers of the act, whether he can make any lease or leases in reversion or not; for no restraint of the lease in reversion is in the act, as is written in the act 32 Hen. 8. c. 28. Therefore it seemed to Manwood and Dyer that the lease above is good and warranted by the act. But Mounson e contra (*i*).

Leonard, on the other hand, who reports the case in his 3rd and 4th volumes, with little or no change of language, notices the act conferring the power, and states that the marquis leased for twenty-one years, and afterwards leased the same land to another for twenty-one years, to begin after the determination of the first; and Dyer is reported (*k*) to have said, “the words are general, *omnes dimissiones*, and, therefore, not to be restrained unto special leases, scil., to leases in possession”; and, according to the 4th volume of

(*i*) The marginal note, ascribed to the better opinion.”
C. J. Treby, adds, “And that seems (*k*) 3 Leon. 72.

Leonard, the case was adjourned; but he makes no mention of Manwood's acquiescence in Dyer's observation.

It is certainly remarkable that no particular allusion was made to the existence of the prior lease as a ground for the decision; but, according to Leonard's report, Dyer founded his opinion on the words of the power being general, *omnes dimissiones*, and, therefore, not restrained to special leases, scil., to leases in possession.

Very little or no light is thrown upon the subject by the case of *Parrot v. Keble* (*l*), where it appears that the court considered a lease for years to begin after an estate for life in possession, a good execution of the power; but this may be accounted for (if we may rely on Godbolt's report) by the circumstance of the power expressly authorising a lease in possession or reversion.

No judgment was pronounced in the case of *Opy v. Thomasius* (*m*); but the opinion of the court was clearly in favor of the distinction. Certain lands which were then in lease for the residue of a term of ninety-nine years were settled on successive tenants for life, with power of leasing in possession for a term mentioned; and the first tenant for life granted a lease to commence at the expiration of the existing term. Keeling, Justice, inclined to think that the lease was within the power, the settlement being solely of a reversion; but Windham and Twisden held, that although a power of leasing, in general terms, would authorise a lease of the reversion, or a lease in reversion, if the premises were in lease at the creation of the power, and continued subject to the same lease when the power was exercised, yet, as the power expressly mentioned leases in possession only, a lease in reversion could not be granted, though the premises were under a lease granted prior to the creation of the power.

These, as the reader will perceive, were cases of particular

(*l*) *Parrot v. Keble*, Godb. 195.
Oable v. Perrot, Brownl. & Gold. 173,
 semb. S. C.

(*m*) *Opy v. Thomasius*, 1 Lev. 167;
 S. C., nom. *Opey v. Thomasius*, T. Raym.

132; S. C., nom. *Opee v. Thomasius*, 1
 Sid. 260; S. C., nom. *Opie v. Thomasius*, 1 Keb. 778. 910. See Comb. 377.
 See also *O. Bridgm. by Bann.* 613,
 Appendix.

powers affirmative. Another case⁽ⁿ⁾, tending to the same conclusion, remains to be added, where the question arose on a general power restrained by a negative.

Thomas Lord Coventry, being seised of the reversion of certain premises expectant on the determination of a lease for ninety-nine years if Sir Thomas Haslewood and two other persons should so long live, settled them to the use of himself for life; remainder to Thomas, his eldest son, for life; with remainders over. And in the settlement there was a proviso, that it should be lawful for every person who should be actually seised of the freehold of the premises to make leases of any part thereof for any term not exceeding twenty-one years, or determinable on one, two, or three lives, so as there should not be in any part of the premises so leased at any one time any more or greater estate or estates than for twenty-one years, or for three lives, or for any number of years determinable on three lives. Thomas, the eldest son, and then Earl of Coventry, and tenant for life, demised the premises to S. and C. for ninety-nine years from the death of Sir T. Haslewood, the survivor of the three cestuis que vie, if the countess should so long live. The single question was, whether this lease was pursuant to the power: and, after many arguments, the court was of opinion that the lease made by Thomas Earl of Coventry was good pursuant to the power given him by the settlement.

All these cases are in favor of the distinction alluded to: But there are others as strongly opposed to it.

The case of the Countess of Sussex *v.* Wroth may be first referred to. It is observable, however, that scarcely two of the books in which it is reported or cited concur in their statement of the facts; and not only do they differ as to the existence of a lease anterior to the one respecting which the question arose; but the books which admit its existence do not concur in the circumstance of its being created previously to, or by virtue of, the power.

(n) *Coventry v. Coventry*, Com. 312.

According to the report of the case by Croke (*o*), the land was assured by the Earl of Sussex, by act of parliament, to his wife for her jointure, the reversion in fee to the earl, with power to the earl to lease for twenty-one years; and the earl made a lease for twenty-one years, and before the end of it, and in the month of March, made another lease to the same lessee for twenty-one years, to commence at the Michaelmas following; and it was adjudged a void lease, because for the time it was a lease in reversion. To the same effect is the citation of the case in Mountjoy's case, in Moore (*p*).

Leonard reports in his first volume (*q*), that the premises were settled by act of parliament upon the wife of the Earl of Sussex, during her widowhood, for her jointure; and that when the power was exercised they were in lease to the crown, by virtue of a demise made by the ancestor of the earl (the donee). The third volume of the same reporter (*r*) does not state whether the first lease, which is there admitted to have been existing at the time of the grant of the second, was made by virtue of the power, or not. The words are, "The manor of Burnham was assured to the Countess of Sussex for her jointure; with a proviso in the act, that it should be lawful for the Earl of Sussex to make a lease or leases for twenty-one years (*s*), and afterwards, a year before the first lease was ended, he made another lease for twenty-one years, and this second lease was to begin and take effect from the end of the first lease. And it was adjudged that the lease was void.

From the reference to the case in Latch (*t*), and Palmer (*u*), it would seem that the first lease was made in exercise of the power. It there appears, that a private statute was made, by which land was assured to the Countess of Sussex for her jointure; but with power to the earl to make leases for twenty-

(*o*) Countess of Sussex *v.* Wroth, Cro. Eliz. 5.

(*p*) Mo. 199.

(*q*) Nom. Lepur *v.* Wroth, 1 Leon. 35.

(*r*) 3 Leon. 130, nom. Wroth *v.* The Countess of Sussex case.

(*s*) In the 4th volume of Leonard, where this case is also reported, p. 65, it is here said, "The earl made a lease for twenty-one years, and afterwards," &c., as above.

(*t*) Latch, 243.

(*u*) Palm. 463-9.

one years, who, half a year before the end of the first, made another lease for twenty-one years, to commence at the end of the first; and it was said not to be good; first, because it was a particular power to make leases; and, secondly, because, being once executed, it should never be executed afterwards; and this was the main reason.

The quotation of the case in Popham (*x*), though a little ambiguous, seems to correspond with the report in Leonard's third volume, for it is stated that in the case of the Countess of Sussex, who had a jointure for life by act of parliament, with a proviso that the earl her husband might demise it for one-and-twenty years, rendering the usual rent, where the said earl had made a lease for one-and-twenty years, according to the statute, within a year before the end of the same lease, the earl made a new lease for one-and-twenty years, to begin after the end of the former lease, and died, the countess avoided the last lease, &c.

As the case is cited in Fitzwilliam's case (*y*), and afterwards by Rokesby, J., in *Winter v. Loveday* (*z*), no mention is made of the existence of a previous demise; but it is said that H. Earl of Sussex conveyed the manor to the use of himself for life, and afterwards to the use of the countess for life, with power to the earl to lease for twenty-one years; and that he, in April, made a lease for twenty-one years, to begin at the Michaelmas following, and that such lease was void. The slight notice of the case in Moore (*a*) is also silent as to an existing term.

Notwithstanding these differences, it appears to have been universally admitted that the lease was void.

The case of Slocomb, or Shecomb, *v. Hawkins* (*b*), also seems opposed to the distinction; but it is to be regretted that the reports do not furnish the means of ascertaining the facts. A tenant for life with power to lease at any time for twenty-one

(*x*) Poph. 9, nom. The case of the Countess of Sussex.

(*y*) 6 Co. 33, a., nom. Leaper *v. Wroth*.

(*z*) 5 Mod. 380.

(*a*) Mo. 494.

(*b*) Slocomb *v. Hawkins*, Yelv. 222; S. C., nom. Shecomb *v. Hawkins*, Cro. Jac. 318; 1 Brownl. 148. 3 Salk. 276.

years made a lease for that term to commence after the determination of one already in existence, and it was clearly held that the second lease was void; for if the donee might upon such power make lease upon lease, she might by making infinite leases detain those in remainder from the possession for ever, which would be contrary to reason, and the intent of the parties. But the chief difficulty lies in discovering whether the first lease was made before, or by virtue of, the power. As Yelverton reports the case, it was made in pursuance of the power: Croke, on the other hand, reports that the first lease was in existence at the creation of the power; and it may not be immaterial to notice that Rokeby, J., in *Winter v. Loveday* (c), and Bridgman, C. J., in *Berry v. White* (d), adopt Croke's statement of the circumstances. Brownlow scarcely affords an inference either way. If, therefore, Yelverton's report be the correct one, the case serves only as an authority that a power of leasing for a specified term, without reference to the period of commencement, will not warrant a lease in reversion: If Croke and Brownlow have stated the facts truly, it is opposed to the distinction in question.

In addition to this case, we have the authority of L. C. J. Bridgman, whose elaborate and luminous argument in delivering the opinion of the court in the case of *Berry v. White* (e) deserves the greatest attention, not only as it relates to the point in question, but for the miscellaneous information it affords on the subject of powers in general. "It stands," said that learned Judge (f), "with the reason of law to consider and weigh the nature of the estate at the time of creating the power; if the estate upon which the power is executable were in possession; or, if it were in reversion, construction is to be made *aliter, et aliter* where the words of the power are indefinite and general. In *Leaper and Wroth's* case (g), cited in *Fitzwilliam's* case (h), it is agreed, if a man have a power

(c) 5 Mod. 380; S. C. ut sup. p. 423,
n. (z).

(d) O. Bridgm. by Bann. 96.

(e) *Berry v. White*, O. Bridgm. by

Bann. 82.

(f) O. Bridgm. by Bann. 94.

(g) Sup. p. 461.

(h) 6 Co. 33, a.

to make leases for twenty-one years indefinitely, without a restraint to make them in possession, yet he cannot make a lease in reversion, or to take effect at a day to come; for he may make it to take effect in possession. But suppose that at the time of such a general indefinite power created, the estate was only an estate in reversion, expectant upon another for years or lives, there, I conceive, he may make a lease presently after the power created, though the former lease was in being; for it was a reversion when it was settled; and as a reversion upon such a power he may lease it. But, indeed, such a lease, though it take effect in point of interest *de futuro*, yet it must be made to begin presently, as in case of a concurrent lease of a bishop. And this, as Justice Jones said in the argument of *Evans v. Ayscough* (*i*), 3 Car. 1., was put by Popham to be agreed in the Marquis of Northampton's case (*j*); it is implied in the report of *Shecomb v. Hawkins'* case, 2 Cro. 319 (*k*). It cannot be made to begin at a future day."

Nothing can be stronger or more conclusive than these words: they plainly deny to the donee the privilege of making a lease to commence in reversion on the determination of an existing term, though that term was in being when the power was created. And we may here remark that the decision in *Berry v. White* in favor of a lease granted to commence at the determination of an existing lease is not inconsistent with the observations of C. J. Brigidman, founded, as it was, on the particular wording of the power, which enabled the donee to grant for any term, &c., so as such estate and term should not exceed the number of twenty-one years or three lives *in possession and remainder*.

The case of *Baynes v. Belson* (*l*) is to the same effect. Sir John Curson having made a settlement, among other uses, to the use of himself for life, with power to make leases to any

(*i*) *Evans v. Ayscough*, Palm. 457; S. C. ut sup. p. 294, n. (*r*).

(*j*) Ante, p. 456.

(*k*) Ante, p. 461.

(*l*) *Baynes v. Belson*, T. Raym. 247-8, 2nd point. The case was adjourned upon another question.

persons for one, two, or three lives, or for one-and-twenty years, made a demise to E. B. for twenty-one years, to commence after the deaths of J. and M., who were tenants for lives, and who lived several years after; and the whole court were of opinion that the power was not well executed, the lease being to commence *in futuro*.

The case of Doe dem. Copleston *v.* Hiern (*m*), before noticed (*n*), where the lease was set aside, being made to commence at a future day, scarcely furnishes an argument on either side, and for three reasons, 1st, because it is not stated when the existing interest for years determinable on the lives of J. L. and M. R. was created; 2ndly, because the attention of the court was not called to the distinction under consideration; and, 3rdly, because J. L. and M. R. might by possibility have survived the existing term, in which case the reversionary interest, instead of being dependent on the determination of the preceding interest, must have waited to take effect until the decease of the survivor of J. L. and M. R.

As the point is not free from doubt, no prudent practitioner would take upon himself the responsibility of advising a party to take such a lease in reversion.

If the power require the leases to be made in possession, a lease in reversion cannot be granted, though the estate in the premises was only a reversion when the power was created (*o*).

A second lease, however, if made to commence *in præsentî*, and not exceeding the period marked out by the power, may be supported as a concurrent lease (*p*). It is scarcely necessary to remark, that a new lease granted to the same lessee, to commence *in præsentî*, will operate as an implied surrender of his first lease (*q*).

(*m*) Doe dem. Copleston *v.* Hiern, 5 Mau. & Schw. 40.

(*n*) Ante, p. 434-5.

(*o*) Opy, Opey, or Opie, *v.* Thomas, 1 Lev. 167; S. C. T. Raym. 132; 1 Sid. 260; 1 Keb. 773. 910. See Comb. 377; and Fox *v.* Prickwood, 2 Bulstr. 216; S. C. Cro. Jac. 347; 1

Rol. 12, case (15). 2 Rol. Ab. 260. pl. 5.

(*p*) Berry *v.* White, O. Bridgm. by Bann. 82. 94.

(*q*) I've's case, 5 Co. 11, a., 3rd resolution. Thompson *v.* Trafford, Poph. 8; S. C. 2 Leon. 138.

6. As to the rent to be reserved.

In powers of leasing of former days, it was usual to require the reservation of the “ancient and accustomed rent”; but the practice has comparatively fallen into disuse.

The majority of modern powers of leasing for years direct the best or most improved yearly rent that can reasonably be had or gotten, to be reserved, without taking any fine, premium, or foregift. But where lands have usually been let for lives, the power frequently provides for leases upon fines, which, as the lives or leases drop, are considered among the annual profits (*r*).

Some difference of opinion has prevailed as to the signification of the words “ancient and accustomed rent.” Holt, C. J., thought that they meant the rent that was reserved at the time of the creation of the power, where a lease was then in being; or that was last before the time reserved, where there was no lease then in being; for he that created the power intended no more than that the lessor and lessee should not be able to put the estate in a worse condition, but keep it in the same plight and condition, at least, that it was in when so settled. Suppose (he said) anciently there had been a variety of rents reserved, as, for instance, 19*l*. for many years anciently, and 20*l*. for some few years before the settlement, and at the time thereof the lands were not in lease; in that case, the 20*l*., and not the 19*l*., though a much more ancient rent, would be the ancient rent, for the length of time in that case is immaterial; and for this he depended on the case of *Morrice v. Antrobus* (*s*). And he said that if a tenant in fee made a lease at 50*l*., and afterwards at 10*l*., and then made a settlement, the 10*l*. would be the ancient rent (*t*).

Lord Cowper dissented from this construction. He held, that if leases had been granted twice at a greater, and once at a lesser rent, the two former leases would be the ancient rent,

(*r*) Taylor dem. *Atkyns v. Horde*, 1 Burr. 60. 121.

(*s*) *Hardr.* 325.

(*t*) *Orby v. Mohun*, Gilb. Eq. Rep.

53; S. C. 2 Vern. 531. 542; *Freem. Ch. by Hov.* 291. See also ante, pages 65 and 67, as to leases under the enabling statute of 32 Hen. 8. c. 26.

for the last might be made by him who had the fee, who was not bound to reserve the ancient rent, but might let it for nothing if he pleased (*u*).

In a late case (*x*), however, the court confirmed Lord Holt's view of the subject, and said, that, to ascertain what were the ancient rent and reservations, the proper evidence was the last lease. That reference may be made to former leases for the purpose is clearly established (*y*).

If the power require the ancient, usual, and accustomed rents, boons, heriots, and services, usually paid, or more, to be reserved, a lease omitting covenants on the lessee's part to pay all taxes, rates, duties, and impositions, cannot be supported, if the former amount of rent be reserved; because such rent, being liable to deductions for land-tax, and other taxes, cannot be considered as the ancient rent (*z*). So, if the former leases have contained a covenant on the lessee's part to repair, or to grind at the lessor's mill all the corn which he (the lessee) should spend upon the premises, the omission of a covenant to perform these duties, which are in the nature of a boon or service, will prove fatal to the lease (*a*).

So, where there was a power of leasing lands anciently demised, so as the ancient and accustomed yearly rent and reservations were reserved, and the donee demised the premises, with an exception of "all timber trees, bodies of pollard and other trees whatsoever," the exception in former leases being of "all and all manner of timber trees and trees likely to prove timber," so that in the new lease the upper part of the trees, from which lops, tops, and boughs, might be taken, was not excepted, it was held that, as the exception was larger in the old than in the new lease, the premises could

(*u*) *Orby v. Mohun*, Gilb. Eq. Rep. 58.

(*x*) *Doe dem. Douglas v. Lock*, 2 Adol. & Ell. 705. 736; S. C. 4 Nev. & Man. 807.

(*y*) *Smith v. Doe dem. Jersey*, D. P. 2 Brod. & Bing. 473; S. C. 5 J. B. Mo. 332; 7 Pri. 379; 3 Bli. P. C. 290. *Doe dem. Earl of Shrewsbury v. Wil-*

son, 5 Barn. & Ald. 363. *Doe dem Douglas v. Lock*, sup.

(*z*) *Earl of Cardigan v. Montagu*, Sugd. Pow. Appendix, 6th ed. p. 596. 603, 3th point. Reg. Lib. A. 1754. fol. 406.

(*a*) *Earl of Cardigan v. Montagu*, sup.

not be taken to have been demised at the ancient rent, and, therefore, that the new lease was void (*b*).

In the same case (*c*) it appeared, that the manor of P. was devised to A. for life, with a power of leasing such parts of the lands lying within the said manor as had anciently been demised, so as the ancient and accustomed yearly rent and reservations were thereby reserved; such leases being from time to time made and granted in the same manner and form, and with and under such and the like reservations, restrictions, covenants, conditions, and agreements, as were usually and customarily contained in leases of the same kind, in the several and respective parishes and places where the same premises were situated. In the ancient leases there was a provision for the lessees “doing and performing, from time to time during the said term, suit, toll, custom, and service, to and at the water-grist mill of and *belonging to the lord of the said manor*, and situate and being within the same, by grinding all his and their corn there”; whereas in the lease on which the question arose the render was, “from time to time during the said term, such suit, toll, custom, and service, to and at the water-grist mill of and belonging to the said A. (the tenant for life), *her heirs or assigns, and also to the person or persons as aforesaid*, by grinding all their corn and grain at such mill; but the variance was held to be immaterial.

There is no objection to a greater rent than that usually or anciently payable being reserved (*d*).

In the case of *Doe v. Creed* (*e*), a power was given to a devisee for life of certain estates in the counties of Sussex, Huntingdon, and Middlesex, and in the city of London, to grant leases of the estates in the counties of Sussex and Huntingdon for any term or terms of years not exceeding twenty-one, so as there should be reserved by such lease or

(*b*) *Doe dem. Douglas v. Lock*, 2 Adol. & Ell. 705. 746; S. C. 4 Nev. & Man. 807. *Smith v. Bole*, Cro. Jac. 458.

(*c*) *Doe dem. Douglas v. Lock*, 2 Adol. & Ell. 705. 743; S. C. 4 Nev. &

Man. 807.

(*d*) 3 Ch. Rep. 78. *Campion v. Thorpe*, Clayt. 99. *Doe dem. Newnham v. Creed*, 4 Mau. & Selw. 371.

(*e*) *Doe dem. Newnham v. Creed*, sup.

leases *the most rent* that could be got for the same; and of the premises in the county of Middlesex and city of London for any term or terms of years not exceeding sixty-one, so as there should be reserved thereon *the usual or other the most rent* that could be had for the same. The donee of the power demised a part of the premises in the city of London for sixty-one years, in consideration of a fine, reserving a yearly rent of 10*l.*, which, without a fine being paid, were worth 50*l.* a year. It appeared, that when the power was created the premises were in possession of a tenant, who had paid a fine of 100*l.*, and who then paid a yearly rent of 6*l.*; and the lease was held to be valid. Le Blanc, J., said, that if the testator's object had been to prevent the taking of a fine upon the lease of the lands in London and Middlesex, and to require that the remainder-man should have the most rent, he had no occasion to vary the phrase in respect of these lands from that which he had used in respect of the lands in the two other counties; and therefore, by introducing the term *usual*, he certainly meant to secure to the remainder-man as much rent as before, but he also meant to give the tenant for life power to take a fine (*f*). And Dampier, J., in the course of the argument, said, that he had always considered *usual* in these powers as contrasted to *most*.

In a recent case (*g*), a power of leasing was given to tenant for life, so that there should be reserved in every such lease, during the continuance thereof, the ancient and accustomed rent and heriots for the premises therein contained, or more; and a lease, dated 30th June, 1783, was made, in which the only reservation as to heriots was as follows:—"Yielding and paying, on the several deaths of H. B. and E. A. B., the sum of 6*l.* 13*s.* 4*d.*, they dying after the commencement of the term whether in succession or otherwise, for and in the name of an heriot." A lease of the premises was produced as a pattern lease, dated 13th September, 1734, being the lease in existence at the creation of the power, and granted for ninety-nine years determinable on

(*f*) 4 Mau. & Selw. 377.

(*g*) Doe dem. The Earl of Egremont

v. Grazebrook, 4 Q. B. 406; S. C. 3 Ga. & Dav. 334.

the lives of J. B., E. B. and M. H., wherein the reservation of the heriots was as follows :—"Yielding and paying, upon the death and deaths of each and every of them the said J. B., E. B. and M. H., three of his, her and their best beasts, or three of the best beasts of the then tenant in possession of the premises, or that shall be then thereon depasturing or feeding, or the full sum of 6*l.* 13*s.* 4*d.*, at the choice of the said [lessor] his heirs and assigns, for and in the name of an heriot or far-lief(*h*) : provided that, living the said J. B., no such heriot or sum of money in lieu thereof shall be paid or demanded on the death of his sister, the said E. B., or, living the said J. B. or E. B., on the death of their mother, the said M. H." At the trial it was contended for the lessee, that though the heriot reservation in the later lease was not the "ancient and accustomed" heriot, as appeared by comparison with the former, yet the reservation in that respect was "more" than in the former, and therefore followed the power; upon which a question arose, whether the proof of that allegation lay on the plaintiff or lessee; and the court, though not prepared to say that the burthen of proof would lie in all possible cases on a lessee under a power, yet when a lease avowedly varied from a pattern lease in so important a point as to deprive the landlord of an option between a sum of money and the three best beasts, the change in the reservation threw upon the lessee the burthen of making out that the new state of things was as beneficial as the old.

If the lessor reserve less than the ancient rent required by the power, the lessee cannot substantiate the lease by consenting to pay the ancient rent afterwards; the maxim of law being, *quod initio non valet, tractu temporis non potest convalescere* (*i*).

Where the power prescribes a reservation of the usual, or ancient and accustomed rent, great circumspection is required

(*h*) In some manors westward, they distinguish *Farleu* to be the best good, as *Heriot* is the best beast, payable at the tenant's death, note, 4 Q. B. 408,

cites Cowel Interp. in voc. "*Farley* or *Farleu*."

(*i*) Jones dem. *Cowper v. Verney*, Willes, 169. 176.

in framing the reddendum, to insure its reservation out of the identical lands in respect of which it has usually been payable; for if a tenant for life of lands, over part only of which he has a power of leasing, reserving the ancient or accustomed rent, make a lease of all the lands at one entire rent (*j*); or if tenant for life with power of leasing such part of the estate (except certain specified lands) as had been usually let to farm, reserving the like rents, services, heriots, and profits as at the time of the settlement were reserved and payable for the same, or more, make a lease of all the estate, including the excepted lands (*k*); in either case the lease will be void, as against the remainder-man, for the whole. The rent under such circumstances cannot be called the ancient and accustomed rent, since it issues out of all the premises, part of which was not charged with a rent before (*l*). The demise cannot be supported even for the premises subject to the power, though the rent reserved equal or exceed the sum usually paid as the ancient or accustomed rent (*m*). And it seems that the same effect will be produced if the lease lay the remainder-man under difficulties to know whether the usual rent be reserved; as if it extend to things out of which no rents can be reserved, as tithes (*n*), rents of assize, rents of customary tenants, commons, feedings, deer, and the like (*o*).

There is a difference, however, between these cases, and the case of a party owner in fee of certain lands, and tenant for life of others, with a power of leasing at the ancient rent, making a lease for the whole at an entire rent. In the latter, although the lease, after the decease of the lessor, would be

(*j*) Mountjoy's case, 5 Co. 5, b., 5th resolution. *Campion v. Thorpe*, Clayt. 99. Doc dem. *Bartlett v. Rendle*, 3 Mau. & Selw. 99. *Earl of Cardigan v. Montagu*, Sugd. Pow. Appendix, 2nd 3rd and 5th points. Doc dem. *Douglas v. Lock*, 2 Adol. & Ell. 705. 747; S. C. 1 Nev. & Man. 307. And see Doc dem. *Griffiths v. Lloyd*, 3 Esp. 73.

(*k*) Doc dem. *Williams v. Matthews*,

5 Barn. & Adol. 293; S. C. 2 Nev. & Man. 264.

(*l*) Ibid.

(*m*) Ibid.

(*n*) See post, Reddendum, as to a reservation of rent out of tithes.

(*o*) Taylor dem. *Atkins v. Horde*, 1 Burr. 60. 124. *Earl of Cardigan v. Montagu*, Sugd. Pow. Appendix, 2nd point.

void as against the remainder-man, as to the lands subject to the power, it would remain in operation as to the lands in fee, and the rent would be apportioned (*p*).

And in a late case in Ireland (*q*) it was said, that lands comprised in a power of leasing may be demised with others not within the power at an entire rent, if the power be general and unrestricted; as, in the event of the lessee being evicted from the lands not affected by the power, there would be an apportionment of the rent at law in favor of the person entitled under the settlement; but that an objection on that ground in the case of the ordinary power of leasing would be entitled to great weight (*r*).

If the reservations be distinct, the usual rent being reserved on some premises, and not on others, the lease will be void only as to those which have not the usual reservation (*s*). So, if several parcels be comprised in one lease, with several rents, some greater and some less than have usually been reserved, the lease will be void as to those parcels which have not the proper rent reserved out of them, although the entire amount of rent be reserved in the whole (*t*). Under a power of leasing, reserving so much rent or profit as has formerly been reserved upon every demise for twenty-one years or three lives in possession only, the lands in the possession of the party creating the power may be demised without rent (*u*).

It is now settled, in subversion of a contrary doctrine contained in Coke's reports (*x*), that a part only of premises formerly let jointly may be demised separately, at a rateable rent, bearing the same proportion to the former rent as the part leased bears to the whole land (*y*).

(*p*) Doe dem. Vaughan v. Meyler, 2 Mau. & Selw. 276. Doe dem. Williams v. Matthews, 5 Barn. & Adol. 298; S. C. 2 Nev. & Man. 264.

(*q*) Muskerry v. Chinnery, Lloyd & Goo. 185. 229, temp. Sugden, C.

(*r*) Ibid.

(*s*) Campion v. Thorpe, Clayt. 99. Doe dem. Bartlett v. Rendle, 3 Mau. & Selw. 99. Tanfield v. Rogers, Cro.

Eliz. 340.

(*t*) Ibid.

(*u*) Campion v. Thorpe, sup.

(*x*) Lord Mountjoy's case, 5 Co. 3, b. 5, b., 5th resolution; S. C. Mo. 197. And see Co. Lit. 44, b.

(*y*) Doe dem. Earl of Shrewsbury v. Wilson, 5 Barn. & Ald. 363. 385, 5th point. Doe dem. Lord Egremont v. Stephens, 6 Q. B. 208.

The statute of 39 & 40 Geo. 3. c. 41, after reciting that doubts had arisen on the subject, enabled ecclesiastical persons to grant separate leases of parts of lands usually demised by one lease and under one rent; but we are not necessarily to infer from thence that those doubts were well founded. Acts of parliament for the purpose of removing doubts are very beneficial, because they prevent that expense of litigation which otherwise must take place in order to have such doubts resolved (z). Mr. Justice Bayley, contrasting the doctrine laid down in Coke's report with that advanced in his Commentary on Littleton, considered that there must either have been some mistake in the report, or that the opinion of the profession was decidedly against the doctrine there laid down.

It is advisable, however, as suggested by Sir Edward Sugden, where powers are given to lease at the ancient rent, expressly to declare that leases may be made of part, at rents *pro ratâ*, and that lands usually demised by several leases at several rents may be demised by one lease at the aggregate of the old rents (a).

Where the ancient and accustomed yearly rent is directed by the power to be reserved, reference should be made to former leases for the purpose of ascertaining not only the amount of that rent, but the days also on which the same has usually been made payable; and the same days should be adopted as the periods for the payment of rent under the new lease. This formerly gave rise to a difficulty in practice. When the payment of rent was made to commence on the quarter day, (supposing the rent to be payable quarterly,) or on the half-yearly day, (supposing it to be payable half-yearly,) next ensuing the execution of the lease, and the lease was not made to begin on the quarter day, or half-yearly day, (as the case might be,) immediately preceding the first reservation, it followed that an entire quarter's or half-year's rent would be reserved and paid for an occupation of less than a quarter or half-year; and also that, unless an apportioned rent were

(z) Per Abbott, C. J., 5 Barn. & Ald. 336.

(a) Sugd. Pow. 6th ed., vol. 2, p. 435.

reserved for the interval between the last quarterly or half-yearly day of payment and the day of the determination of the lease, no rent would be payable for that interval; a circumstance which, it was urged, would materially prejudice the remainder-man, in case of the death of the lessor immediately after the receipt of the last quarterly or half-yearly rent; and thus affect the stability of leases so prepared. But it is now settled that they are not objectionable on that ground. A dictum on the subject is to be found in Lord Raymond's reports (*b*), in a case quite foreign to the point in question. Powell, Justice, there said, that if a man had a power to make leases, reserving the ancient yearly rent annually; yet if it were reserved upon a day before the year was up, as if the year ended at Christmas, and it was reserved at Michaelmas, it would be well, pursuant to the power, to which Holt assented. But later authority (*c*) has placed the point beyond the reach of controversy; and as it establishes an important doctrine, an abstract of its particular circumstances cannot fail to be serviceable.

By a private act of parliament, passed in 1720, for annexing the Duke of Shrewsbury's estate to the Earldom of Shrewsbury, and confirming Gilbert Earl of Shrewsbury's settlement, a power was given to the successive tenants in tail to lease the premises in question, "so as upon every such lease and leases there be reserved and made payable yearly, during the continuance thereof, the usual and accustomed yearly rents, boons, and services for the same," &c. George, Earl of Shrewsbury, the then tenant in tail, executed a lease, dated 6th January, 1785, by which, in consideration of the surrender of a former lease, dated 13th January, 1756, for three lives, two of which were then since dead, and also in consideration of 105*l.* paid by the lessee for adding two lives, he demised the premises in question, from the day of the date of the indenture, for ninety-nine years if three persons therein named should so long live, yielding and paying, therefore, yearly and

(*b*) Regina v. Weston, 2 Ld. Raym. 1197-8.

(*c*) Doe dem. Shrewsbury v. Wilson, 5 Barn. & Ald. 363.

every year, during the said term thereby granted, unto the said Earl, his heirs and assigns, the yearly rent or sum of 50*l.*, at and upon the two usual feast days and terms in the year, called the feast day of the annunciation of the blessed Virgin Mary, and the feast day of St. Michael the Archangel, by even and equal portions, clear over and above all manner of taxations, impositions, and payments, of what nature or kind soever, the first payment thereof to begin and be made on the feast day of the annunciation of the blessed Virgin Mary next ensuing the date thereof. The premises had formerly been demised by indenture, dated 2nd February, 1708; and by that lease, as well as by the lease of the 13th of January, 1756, the rent was reserved payable at Lady-day and Michaelmas-day in every year. The demise of 1785 was objected to as a fraud on the power on the ground that it reserved a forehand rent; for the first payment being to take place on the 25th of March, six months' rent was payable for an occupation of two months and nineteen days, and at the end of the term there would be three months and seven days for which no rent would be payable, the last rent being payable on the 29th of September; so that if the title were to descend on the remainder-man on the 30th of September in the last year of the term, he would not be entitled to any rent, or any advantage from the land, between that day and the expiration of the term on the 6th of January following; but the court, founding their judgment on the circumstance of the rent being made payable on the same days in the previous leases of 1708 and 1756, to which they considered they must necessarily refer, in order to ascertain what were the usual and accustomed yearly rents(*d*), determined, that the power was well executed, and that a rent payable on those days, although the right to demand it arose in less than half a year, was a usual and accustomed rent, within the meaning of those words in the condition contained in the leasing power. "Indeed," said

(*d*) For this the court cited *Smith v. Doe* dem. Earl of Jersey, in error, 2 Brod. & Bing. 473.

L. C. J. Abbott, "when we consider that this is a lease for lives granted upon the surrender of another lease, we cannot help seeing that it is in effect an extension of time upon fresh terms; and where the time only is extended, it is most reasonable that the day of the payment of the rent should continue to be the same, and should not vary according to the day on which the new lease may happen to be granted." But this circumstance was not adverted to by the other judges as a ground for their opinion.

In order to guard against questions of this kind, should any doubt remain, it may be advisable in practice to reserve an apportioned rent for the number of days that must intervene between the last half-yearly or quarterly rent day, and the day of the determination of the lease.

How far the reasoning which will support a lease under a power requiring the ancient and accustomed rent is applicable to a lease under a power requiring the best and improved yearly rent without fine, remains to be noticed.

In *Doe dem. Wilmot v. Giffard (e)*, there was a power of leasing, "so as there be reserved the best and most approved yearly rent, without any fine," &c. A lease was granted, dated 14th September, for twenty-one years from the date, at a yearly rent, payable by two even half-yearly payments on the 29th September, and the 25th March, in every year, the first payment to be made on the 25th of March then next; and on an objection being made that, as the term would expire on the 14th of September, no rent would be payable from the 25th of March preceding its determination, Lord Ellenborough was of opinion that the lease was void; and the lessor of the plaintiff recovered.

The case of *Doe v. Morse (f)* was very similar to *Doe v. Giffard*. A tenant for life under a settlement with a power of leasing the premises for one, two, or three life or lives, or

(e) Cited in *Doe dem. Earl of Shrewsbury v. Wilson*, 5 Barn. & Ald. 371.

(f) *Doe dem. Harries v. Morse*, 2

Crompt. & Mees. 247; S. C. 4 Tyrwh. 185. See also *Doe dem. Douglas v. Lock*, 2 Adol. & Ell. 741; S. C. 2 Nev. & Man. 322.

any term or number of years not exceeding twenty-one years, so as upon all and every such lease or leases there should be reserved and continued payable during the respective continuance of such lease and leases, by half-yearly payments, the best and most improved yearly rents that could be reasonably had or obtained, without taking any sum or sums of money, or other thing, by way of fine or income for the same, made a lease, dated 11th January, 1783, whereby, in consideration of the surrender of a former lease, and of the rents and covenants thereafter reserved and contained, he demised a part of the settled estates, to hold from the 4th of January then instant for the lives of three persons therein named, yielding and paying, therefor, yearly and every year during the said term the yearly rent or sum of 31*l.* 10*s.*, at or upon the two most usual feasts or days of payment in the year, viz., the feast of St. Philip and James the Apostles (1st May), and St. Michael the Archangel (29th September), by even and equal portions, the first of such payments to begin and be made on the feast of St. Philip and James the Apostles next ensuing the date thereof. And it was held, that the lease was not a due execution of the power, as the rent was reserved, not half-yearly, but at intervals very distinguishable from half-yearly reservations; the first rent being payable long before a half-year's occupation had elapsed; and the second very long before a year's. It was attempted to distinguish the case from *Doe v. Giffard* on the ground of its being a freehold lease; but Lord Lyndhurst was of opinion that that circumstance did not make any difference in principle, as the interests of the remainder-man might be equally injured in the one case as in the other. It was further held, that leases of other estates in the country were not admissible in evidence to shew that the days of reservation in the lease were the usual days of reservation in that part of the country; though evidence that they were the usual days of payment might have been given by showing that it was the custom to pay rents on those days in that neighbourhood.

But it is rather difficult to reconcile the two cases last

quoted with *Isherwood v. Oldknow* (*g*), decided in the interval between them. Under a power of leasing at the best and most improved yearly rent, without taking any sum or sums of money or other thing for or in lieu of a fine or income for the same, a lease was made, dated 15th October, 1800, for fourteen years, to be computed, as to the meadow and plough lands from the 13th of February then last past, the pasture lands from the 25th of March also then last, and the messuage, &c., from the 12th of May then also last, under a yearly rent of 100*l.*, by half-yearly payments on the 11th of November and the 25th of March, the first payment thereof to be made on the 11th of November next ensuing the date of the indenture, &c.; and it was objected that the lease was void, as it stipulated for the payment of half a year's rent at the end of the first twenty-seven days, which was in effect taking a sum of money for a fine; but the court were of a different opinion, regarding the reservation as having been made in consideration of an antecedent occupation. A remark, however, by Mr. Justice Bayley would lead us to suppose that the lease might have been avoided by the lessee's showing that he had had no occupation prior to the 15th of October, when the lease was granted (*h*). It is observable that *Doe dem. Wilmot v. Giffard* was not cited by either party.

And it is submitted that the later case of *Doe v. Rutland* (*i*), unless distinguishable from, is scarcely in conformity with, *Doe v. Morse*, and *Doe v. Giffard*. A power was given by will to demise the premises in question for any term or number of years not exceeding twenty-one years in possession, and so as upon every such lease there should be reserved and made payable during the continuance thereof respectively the best improved yearly rent that could reasonably be had for the same, without taking any sum or sums of money by way of fine or income for or in respect of such lease or leases. In pursuance

(*g*) *Isherwood v. Oldknow*, 3 Mau. & Selw. 332.

(*h*) 3 Mau. & Selw. 404.

(*i*) *Doe dem. Wythe v. Rutland*, 2 Mees. & Wel. 661; S. C. Mur. &

Hurl. 245; S. C., in error, nom. *Rutland v. Doe dem. Wythe*, 5 Mees. & Wel. 683, where the judgment of the court below was reversed.

of this power, a lease was made on the 14th of December, 1833, habendum from the 11th of October then last for twenty-one years, yielding and paying the yearly rent of 903*l.*, by equal half-yearly payments, viz., on the 6th of April, and the 11th of October in every year, by equal portions, except the last half-year's rent, which was reserved and agreed to be paid on the 1st of August next before the determination of the said term. An objection was taken that the reservation of the last half-year's rent was not valid, as no rent would be payable from the 1st of August to the 11th of October in the last year; and that if the lessor should die in the interval, he would receive all the benefit of the rent for the whole of that year, and the remainder-man would be kept out of possession, without receiving any rent. The court of Exchequer, however, held, that the reservation of the last half-year's rent before the complete expiration of the year was a matter of prudence and caution, and was in general for the benefit of the lessor, whoever he might be; and that it could only be detrimental to the remainder-man on the supposition of the tenant for life dying after the day on which the last half-year's rent was reserved, and before the expiration of the term, a supposition very highly improbable. And they said that the case of *Doe dem. Wilmot v. Giffard* (*k*) was distinguishable in the circumstance of there being there a clear loss of one half-year's rent, as not twenty-one years' rent, but only twenty and a half was reserved; a statement, by the way, not exactly consistent with the facts of the case. This judgment was reversed on appeal to the Exchequer Chamber (*l*); but on appeal to the House of Lords (*m*), the judgment of the Exchequer Chamber was reversed, and that of the Exchequer restored, Lord Lyndhurst, C., and Lords Brougham and Campbell, and Justices Wightman, Maule, Coleridge, Williams, and Barons Rolfe, Parke, and Alderson, holding the power to have been well exercised, in

(*k*) Ante, p. 475.

(*l*) *Rutland v. Doe dem. Wythe*, 5 Mees. & Wel. 688.

(*m*) *Rutland v. Doe dem. Wythe*, 1 Mees. & Wel. 355; S. C. 10 Cl. & Fin. 419.

opposition to the opinion of L. C. J. Tindal, and Justices Coltman and Patteson.

In a late case which arose in Ireland (*n*), a power was given to a tenant for life to lease the premises in question for any time or term of years or lives and with or without covenants for renewal and in case of the determination of all or any of the aforesaid lease or leases respectively from time to time to make new or other leases thereof in manner aforesaid and with or without any fine or fines as he should think fit. The donee granted leases, and took fines. It was contended that the words “and with or without any fine or fines” did not authorise the receiving of any fines, except upon renewals under covenants in prior leases granted under the power. And Sir Edward Sugden, C., held without doubt, and the Lord Chief Baron Joy (*o*) concurred in the opinion, that the tenant for life could take a fine either upon an original lease or upon the renewal of a lease.

When the case came before Lord Plunket, on a rehearing (*p*), he declared himself to be of a different opinion, considering that the natural construction of the clause, without any transposition of the words, was, that the power of taking fines was applicable to the case of the leases mentioned before the words “with or without any fine or fines,” and that these were clearly the leases to be made on the determination of the leases first mentioned. The case then travelled, as we have seen (*q*), to the House of Lords (*r*); thence back to the court of Chancery in Ireland; and thence to the Irish Queen’s Bench (*s*), where Burke, C. J., and Justices Burton and Perrie, certified, against the opinion of Crampton, J., that the leases were not warranted by the power. But seven of the Judges of England, including the late Lord Chief Justice of the court of Common Pleas (Tindal), before whom the question was argued (*t*), have

(*n*) *Muskerry v. Chinnery*, Lloyd & Goo. 185. 223, temp. Sugden, C.

(*o*) Sugd. Pow. 6th ed. Appendix, No. 19.

(*p*) S. C. Lloyd & Goo. 182. 199, temp. Plunket, C.

(*q*) Ante, p. 430-1.

(*r*) 7 Cl. & Fin. 1; S. C. Rob. & Macl. 493.

(*s*) 2 Jebb & Sy. 300.

(*t*) See ante, p. 431.

reported to the House of Lords their opinion that the donee of the power was at liberty to take a rack rent without a fine, or any other rent with a fine, or upon the determination of any lease to renew it on similar terms.

A general power to lease at a yearly rent is well complied with by the reservation of a rent payable half-yearly or quarterly (*u*).

Questions have arisen upon leases under powers directing the ancient or accustomed yearly rent to be reserved, how far a departure from the accustomed periods of payment, either by making the rent payable quarterly, instead of half-yearly; or half-yearly, instead of quarterly, would affect their validity.

Where the rent has been accustomedly payable half-yearly, there can be no doubt that a half-yearly reservation will be good, though the power prescribe that there be reserved "and made payable yearly" the usual and accustomed yearly rent (*x*).

And it would appear, that if the power require "the accustomed yearly rent or more to be reserved and payable yearly during the term," a half-yearly reservation will be supported, though in the ancient leases the rent was reserved quarterly; for, if the rent be yearly reserved, the power is satisfied (*y*). The cases cited in support of this position arose on leases by ecclesiastical bodies under the statute of 13 Eliz. (*z*); but it is apprehended that they would equally apply to similar questions arising upon private powers of leasing.

In Mountjoy's case (*a*), where a tenant in tail under a

(*u*) *Rutland v. Doe dem. Wythe*, 12 Mees. & Wel. 355. 361. 366. 397; S.C. 10 Cl. & Fin. 419.

(*x*) *Doe dem. Earl of Shrewsbury v. Wilson*, 5 Barn. & Ald. 363, 2nd point. *Fryer v. Coombs*, 11 Adol. & Ell. 403.

(*y*) *Baugh v. Haynes*, Cro. Jac. 76. *Dean and Chapter of Worcester's case*, 6 Co. 37, a. And see *Cook v. Younger*, Cro. Car. 16.

(*z*) 13 Eliz. c. 10, s. 3. In arguing the case of *Doe dem. Earl of Shrewsbury v.*

Wilson, (sup. p. 473,) Campbell, for the plaintiff, stated, (5 Barn. & Ald. 375,) that the statute which created the power did not say that the rent should be payable yearly, but only that the accustomed yearly rent should be reserved; but this was a mistake. The words of the act are, "whereupon the accustomed yearly rent or more shall be reserved *payable yearly* during the said term."

(*a*) *Mountjoy's case*, 5 Co. 3, b.; 4th resolution.

special act of parliament was empowered to make leases, "rendering the true and ancient rent," it was resolved, that a reservation of the rent at two days, where it had been reserved and payable at four days before, made the lease void, because it was *ad nocumentum* of the heirs in tail, which was restrained by the act; for it was more beneficial for them to have it paid at four feasts than at two; and all beneficial qualities of the rent ought to be reserved and observed. It will be noticed, however, that, in this case, the word *yearly* was not mentioned in the power, a circumstance which has been considered (*b*) to distinguish it from the Dean and Chapter of Worcester's case (*c*).

It has not been expressly determined whether the substitution of quarterly for half-yearly payments would be supported under a power requiring the reservation of the ancient or accustomed yearly rent. The point arose in a case just cited (*d*), but did not call for a decision. Lord Denman, in delivering the judgment of the court, after noticing the resolution in Mountjoy's case (*e*), said, "Now, if this decision be correct, it seems difficult to say that a lease is void for reserving the rent at four days instead of two; the new lease need not be a fac-simile of the old one; all that is to be done is, to see that the remainder-man is not prejudiced. And there can be no doubt but a rent payable at four feasts is, upon the whole term created, more beneficial than if payable at two feasts, though there is a possibility, that, as to one quarter, the remainder-man may be prejudiced (*f*); for, on a quarterly reservation, if the tenant for life should die in the first portion of the half-year, the remainder-man would receive both the first and second quarter's rent of the half-year, and would, therefore, be in the same situation as if the rent had been reserved half-yearly; but if the tenant for life should die in the second quarter of the half-year, the tenant for life would receive the

(*b*) 6 Co. 38, b. Doe dem. Douglas
v. Lock, 2 Adol. & Ell. 705. 739; S. C.

4 Nev. & Man. 307.

(*c*) Sup. p. 480.

(*d*) Doe dem. Douglas v. Lock, sup.
(*e*) Sup. p. 480.

(*f*) 2 Adol. & Ell. 738; 4 Nev. &
Man. 820.

first quarter, and the remainder-man only the second quarter, and he would, consequently, be in a worse situation than if the rent had been reserved half-yearly (*g*); but that is a contingency, and, even if it does happen, there is the benefit of the quarterly, instead of half-yearly payments during the rest of the term (*h*). And, after referring to the several cases above cited, he concluded by saying, "Amongst all the conflicting authorities, it is very difficult to come to a conclusion on this part of the case; it is not, however, necessary to do so, because there is another ground upon which we are enabled to give judgment."

The point has, without doubt, lost some of its importance in consequence of the late act (*i*) respecting the apportionment of rents, by which it is enacted (*k*), that, from and after the passing of the act, all rents service reserved on any lease by a tenant in fee, or for any life interest, or by any lease granted under any power, (and which leases shall have been granted after the passing of the act,) shall be apportioned, so and in such manner that on the death of any person interested in any such rents, or in the estate from or in respect of which the same shall be issuing or derived, or by the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators, or assigns, shall be entitled to a proportion of such rents according to the time which shall have elapsed from the commencement or last period of payment thereof respectively, (as the case may be,) including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents being made. Now, as the lessor, in leases made after the act, will, under any circumstances, be entitled to a proportionate part of the rent to his death, however reserved, it seems obvious that a quarterly instead of a half-yearly, or a half-yearly instead of a quarterly reservation cannot affect a remainder-man,

(*g*) 2 Adol. & Ell. 737; 4 Nev. & Man. 320.
Man. 319.

(*i*) 4 W. 4. c. 22.

(*h*) 2 Adol. & Ell. 738; 1 Nev. &

(*k*) Sect. 2.

except so far as the greater convenience of a quarterly reservation is concerned. But I am not aware of any judicial notice of the subject.

The "best rent" means the best rent that can be obtained at the time of letting, without any regard to former leases (*l*). That term, however, does not signify the highest rent offered; as many things besides the mere amount of rent are to be regarded in the choice of a tenant: his ability and good management, for instance, are to be taken into consideration; and, therefore, where the transaction is fair, and no fine or other collateral consideration is taken by the tenant for life leasing under the power, or injurious partiality manifestly shown by him in favor of the particular lessee, there ought to be something extravagantly wrong in the bargain, in order to set it aside on the ground that the person offering the highest rent was not accepted as tenant, although nothing appears to impeach the responsibility of the person making the higher offer (*m*).

The sufficiency of the rent may be regulated by the circumstance of the onus of repairing being thrown on the landlord or tenant. If the premises be to be kept in repair by the tenant, the rent is so much less; if by the landlord, the rent is the greater (*n*).

It is a question for a jury, whether, taking all circumstances into consideration, the rent reserved be the fair rent (*o*). And the best evidence that a man has let for the best and most improved rent, is, that he has taken no more himself than he has taken care those who come after him shall have (*p*). We may trust to the inclination of mankind in general to get as much as they can get, and if the tenant for life provides for those who are to take after him as he has provided for himself, (to be sure he may be under a mistake as to them and as to

(*l*) Doe dem. Griffiths v. Lloyd, 3 Esp. 78.

(*m*) Doe dem. Lawton v. Radcliffe, 10 East, 278.

(*n*) Doe dem. Bromley v. Bettison, 12 East, 305. And see Countess Dow-

ager of Cavan v. Doe dem. Pulteney, 6 Bro. P. C. 175, Toml. ed.

(*o*) Ibid.

(*p*) Per Lord Eldon in the case of the Queensbury Leases, 1 Bli. P. C. 428.

himself, and he may take too little, but it is not very likely he should expose himself to that mistake, or willingly take too little,) this throws a burthen on those who mean to quarrel with such a lease, to prove that there was in the transaction that want of ordinary prudence which shows an inattention to the prescribed terms under which he was to let the lease (*g*).

To invalidate a lease under a power on the ground of a reservation of an insufficient rent, it is not necessary to show fraud and collusion between the tenant for life and the lessee to prejudice the remainder-man (*r*).

Where a power was given to a tenant for life to lease at the best and most improved yearly rent, so as in every such lease there should not be contained any clause whereby any power or authority should be given to any lessee to commit waste, nor whereby any lessee should be exempted from punishment for committing waste, a clause contained in the lease that the lessor should repair the roof of the mansion house, and that, in case of default within three months after notice, the lessee might repair, and deduct the charges out of the rent, was held not to vitiate the lease (*s*). It was urged, that the lessee was exempted from payment of rent to the extent of the money which might be laid out by him in repairs; but the court held, that there could be no objection to provide for setting off one demand against the other (*t*).

The execution of successive leases under one bargain, reserving different rents, will be a fraud upon a power requiring the reservation of the best rent, when the reservation of the same rents would be void if contained in one entire lease (*u*). This position requires illustration. A power was reserved to tenant for life to lease for any term or number of years, so as such term or number of years should not exceed the term or space of ninety-nine years from the date of executing such lease; and so as every such lease or leases should be made to

(*g*) Ibid.

(*r*) Wright v. Smith, 5 Esp. 203.

(*s*) Doe dem. Bromley v. Bettison,
12 East, 205.

(*t*) Ibid.

(*u*) Doe dem. Sutton v. Harvey, 1
Barn. & Cres. 426; S. C. 2 Dow. &
Ry. 589.

take effect either in possession, or immediately after the determination of the leases subsisting thereof respectively; and so that in every such lease there should be reserved to be payable during the continuance of the term and estate thereby to be granted the best and most beneficial yearly rent or rents, to be incident to the immediate reversion of the premises, &c. The donee granted a lease, dated 29th May, 1787, for thirty years from 10th October, 1791, (the day on which former leases of the premises would expire,) at the rent of 202*l.* 10*s.* for the first year, and at the yearly rent of 270*l.* for the residue of the term, which, in the lease, was stated to be the best and most beneficial rent that could reasonably be obtained; and by another lease, dated 4th June, 1787, but agreed for at the same time as the lease of 29th May, 1787, by the same bargain, and in pursuance of which both leases were executed at the same time, he demised the same premises to the same party for sixty-three years from 10th October, 1821, at the yearly rent of 120*l.*, which in that lease was also stated to be the most beneficial rent. This last lease recited that the messuages had been surveyed, and that the surveyor was of opinion, that it would be for the benefit as well of the persons entitled to the premises in reversion, as of the person in possession, that, on or before the expiration of this last lease, the messuages should be rebuilt; and the lease contained a covenant to rebuild the messuages before the expiration of the term of thirty years, or within the first year of the term of sixty-three years. It was admitted, that, if there had not been a covenant to rebuild, the rent of 270*l.* would have been too high during the term granted by the first lease, and too low during the term granted by the second; but that it was not too low during the second term, because the tenant during that term was to bear the expense of rebuilding. And it was held, that this way of leasing was a fraud on the power; and that, although that mode of measuring the rent might be fair as between lessor and lessee, it was not so as between tenant for life and reversioner, because the reversioner would have to bear the whole expense of rebuilding;

whereas, if the tenant had been bound to rebuild at an earlier period, part of the expense would have been borne by the tenant for life (*x*).

If the power require a reservation of the best improved yearly rent, without fine, there can be no objection to the lessee's covenanting to lay out a large sum of money in improvements, if the rent be, notwithstanding, the best that can be obtained. Such a covenant is not necessarily a fraud. It may be made with a fraudulent intent, and when so made, it will avoid the lease. If it be colourable, and merely for the purpose of putting money into the pocket of the tenant for life, it will avoid the lease; or if it were not originally intended as a fraud, but be afterwards used fraudulently, as in the case of a covenant to repair, and a sum of money, under colour of damages for breach of that covenant, being recovered by the tenant for life, a court of equity will at least take care that the damages shall be laid out on the lands (*y*).

And where one having a power to lease at the most improved rent agreed to grant a lease at a rent to be estimated at a fair valuation, without reference to improvements made by the lessee, but these improvements were deemed part of the consideration for the lease, it was doubted how far such a lease would be consistent with the terms of the power. *Primâ facie*, said Lord Lyndhurst, a rent so reserved is not an improved rent; but here it was stipulated that the improvements should be made by the tenant in consideration of the new lease. It is difficult, therefore, to say, whether that can be considered as an infringement of the power (*z*).

In a late case (*a*), a power was reserved to grant leases for a term not exceeding ten years from the day of the date thereof, or seven years from the day of the decease of the donee, so as there should be reserved in such leases the best rent that could be gotten for the same, without taking any

(*x*) Ibid.

(*y*) Shannon v. Bradstreet, 1 Scho. & Lef. 72. And see Roe dem. Earl of Berkeley v. Archbishop of York, 6 East, 86.

(*z*) Price v. Assheton, 1 Yo. & Col. V. C. 82.

(*a*) Doe dem. Rogers v. Rogers, 5 Barn. & Adol. 755; S. C. 2 Nev. & Man. 550.

premium for the making thereof. The donee of the power granted a lease for seven years, to be computed from the day of her decease, at a specified rent, containing a covenant by the lessee to permit the three younger children of the donee, should they desire it, to reside with him after the commencement of the term, and to find for them board, lodging, and wearing apparel, during the term, at 7*l.* a year each, and to provide board, lodging, and wearing apparel, during the term, for the donee's eldest son, without any compensation. All the children had attained twenty-one at the time of the execution of the power. In an action of ejectment, it was contended, on behalf of the plaintiff, that the covenants to maintain the lessor's children were in the nature of a premium, and, therefore, that the lease was void on the face of it; while, for the defendant, it was argued, that it was a question for the jury whether the rent reserved was not the best that could be obtained, and evidence was tendered to prove that the best rent was reserved, without reference to the lessee's covenants; but Mr. Justice Taunton, before whom the cause was tried, being of opinion that the lease was void, as the covenants were in the nature of a premium, rejected the evidence. On motion for a new trial, Parke and Patteson, Justices, held, that, assuming the power to require two conditions, first, that there should be the best rent, and, secondly, that there should be no fine or premium, it did not clearly and incontrovertibly appear upon the face of the lease that either of the conditions had not been performed; for, as to the fine or premium, in the ordinary acceptation of those terms, none was taken; and if benefit to the lessor were equivalent to a fine or premium, none appeared; for it did not necessarily follow that the covenants to support the children were beneficial to the mother, the lessor, as all the children were grown up, and bound to maintain themselves; and after her death she could not be bound to maintain them; and, as to the rent, it was a question for a jury; and as the existence of the covenants was not conclusive that the best rent was not reserved, they thought that the case ought to go to a

new trial. Mr. Justice Taunton, however, retained his opinion.

We have already noticed (*b*), that the reservation of a rent in consideration of an antecedent occupation is not a fraud upon a power of leasing at the best and most improved yearly rent without taking any sum of money or other thing for or in lieu of a fine or income for the same (*c*).

So, again, if, under a power prohibiting the receipt of a fine, a lease be made, the lessee paying two years' rent in advance, secured by the lessor's bond and life insurance, with liberty to retain annually a certain portion of the rent, until the entire amount be repaid, the transaction cannot be impeached, provided the highest rent be actually reserved (*d*).

If trustees of leaseholds for years and lives, with a power of leasing without taking any fine, make leases and take fines, in order to provide for future renewals of the trust property, for the benefit of the cestui que trust, the court will pause before it sets aside such leases, particularly if the cestui que trust has gone on for several years adopting the acts of his trustee (*e*).

Where a power was given by marriage articles to tenant for life to lease at the best improved rent without fine, with a further power enabling him, with the consent of the trustees, to raise any sum or sums of money for such uses and purposes as he should think fit; and the donee granted a lease in consideration of 300*l.* paid, and of a yearly rent reserved, the trustee having consented that he should raise the sum of 5000*l.* by mortgaging all or any part of the estate, or in any other manner he should think fit; it was held that the lease could not be set aside. Regard being had to the true construction of the power to raise money, and the known and long-established usage in Ireland, it was considered that this mode of *firing down* might be one way of raising the money;

(*b*) Ante, p. 475, *et seq.*

(*c*) *Isherwood v. Oldknow*, 3 Mau. & Selw. 382.

(*d*) *O'Brien v. Grierson*, 2 Ball &

Beat. 323.

(*e*) *Bowes v. East London Waterworks Company*, Jacob, 324, 327; S. C. 3 Madd. 375.

and that the tenant for life was clearly warranted in so raising it as well as by any other means (*f*).

It would appear, that if a power of leasing require the best rent that can be reasonably got to be reserved, payable during the term, the absence of a covenant for payment of the rent will vitiate the lease; for, under a mere reservation, it cannot be paid till entry of the lessee; and, therefore, in fact, may never be payable during the term (*g*).

In the case of *White v. Pike* (*h*), a power was contained in a settlement for the several tenants for life, when they should respectively become seised in possession, to demise or lease the lands of Rathenny, [and certain other denominations,] for any term not exceeding ninety-one years or three lives *in possession or reversion*, so as no such lease should be made to continue for a longer term than ninety-one years or three lives from the making thereof; and also to demise or let [the rest of the settled lands, describing them,] for any term not exceeding three lives, or for any term of years not exceeding thirty-one years, or for thirty-one years determinable upon one, two, or three lives, *in possession, and not in reversion, remainder, or expectancy*; so as every such lease should be made by indenture, and not by deed-poll; and so as upon every such lease there should be reserved, and made payable, during the continuance thereof respectively, the most and best yearly rent that could be reasonably had and obtained for the same at the time of making thereof, without taking any sum or sums of money, or other thing, by way of fine or income for or in respect of such lease or leases; and so as none of such leases should be made dispunishable of waste by any express words therein; and so as in every such lease there should be reserved a clause of re-entry for nonpayment of the rent or rents to be thereby respectively reserved; and so as the lessee or lessees to whom such lease or leases should

(*f*) *Ward v. Hartpole*, 3 Bli. P. C. 470.

Sealy, 1 Alc. & Nap. 359.

(*g*) *Taylor dem. Atkins v. Horde*, 1 Burr. 125. *Nugent dem. Atkins v.*

(*h*) *White dem. Earl of Howth v.*

Pike, Cooke & Alc. 42.

be made should seal and deliver counterparts of such lease and leases respectively. It was contended, that the clause in the power requiring the best yearly rent to be reserved did not extend to leases in reversion; but the court were of a different opinion, one circumstance evincing beyond any reasonable doubt the intention of the parties that the clause applied to leases in reversion, and that was, that the same clause which required the best improved rent to be reserved, also required that the leases should not be made dispunishable of waste; that clauses for re-entry on nonpayment of the rent should be contained in them, and that the lessees should seal and deliver counterparts; they said that there could be no reason assigned for confining these requisitions to leases in possession, and they could not be extended to leases in reversion, without extending to them also the reservation of the best improved yearly rent. And as to an argument that the ascertainment of the rent would be rendered difficult by this construction in the case of leases in reversion, they said, that it was not well founded, because the best improved rent required to be reserved was not that which could be obtained at the time of the commencement of the lease in possession, but at the time of making the lease which was to commence in possession at a future time.

Whether the ancient or best rent be reserved, the amount must be specified in terms, or be reducible to a certainty. Thus, the reservation may be of so much per acre, for such number of acres as the lands shall upon a survey be found to contain (*i*).

So, where a power was reserved by a settlement to make leases of lands anciently demised, reserving at least 12s. for every Cheshire acre, it was held, that a lease reserving all the rent intended to be reserved was a valid execution of the power, as the reservation intended by the power did not depend upon uncertain evidence, but might at all times be ascertained by admeasurement (*k*).

(*i*) *Shannon v. Bradstreet*, 1 Scho. & Lef. 73.

cited in *Orby v. Mohn*, Gilb. Eq. Rep. 49; and 3 Rep. in Ch. 110.

(*k*) *Lawson, or Lewson, v. Piggot*,

Where a lease was made in pursuance of a power, reserving yearly so much rent as amounted to two parts in three of the yearly value of the premises, according to the best improved value, it was held, that, unless proof could be made of a greater value than the sum of 290*l.*, which had constantly been paid by the defendant, and accepted by the plaintiff, that sum must be taken as two parts of the full value of the premises at the time of making the lease; and that that sum, or the greater value, if so proved, was to continue to be paid, whether the premises should rise or fall in value (*l*).

But it is not safe to adopt, in the reservation, the words of the power, unless they point out with certainty, either by express words, or by reference to some fixed standard, the actual amount of rent. A tenant for life, with power to make leases of all or any of the lands anciently and accustomedly demised, whereof fines had been usually taken, reserving the ancient usual and accustomed rents, or more; and of all the other lands, reserving the best and most improved rents that could be got, made two leases; and, by the first, demised to the plaintiffs all the several messuages and lands comprised in the indenture of settlement which had been usually letten, and fines taken for the same, or that were within the compass of the proviso, rendering yearly, at the times and days therein mentioned, the several old and accustomed rents for the same, according to the intent of the said proviso; and, by the second, he demised all other messuages, lands, and premises, &c., whereof there were no leases for years or lives in being, and for which no fines were formerly taken, reserving thereon the best improved rents and value thereof, without specifying what those rents were. The case received the greatest consideration, the two chief Justices, Trevor and Holt, having lent their assistance to the Lord Keeper; and it was determined by the Lord Keeper and L. C. J. Trevor, in opposition to the opinion of L. C. J. Holt, that the first lease could not be supported; first, because of the generality and uncertainty of

(*l*) *Audley v. Audley*, 2 Rep. in Ch. 156.

the reservation ; and, secondly, on account of the difficulties which the remainder-man would have to encounter in avowing for and recovering the rent. The second was universally admitted to be void on the ground of uncertainty, the counsel for the lessee giving up the point (*m*) ; and the decree was affirmed by the House of Lords after a lapse of twenty years (*n*).

Under a power to lease at such rent as the donee shall think fit, a nominal rent may be reserved (*o*) ; or the donee may make a lease without reserving any rent whatever (*p*).

If the power prescribe that the rent be reserved payable in gold, a reservation in silver will not do (*q*) ; though a mere variation in terms will make no difference, if the quality, value, and nature, of the thing reserved be the same ; as if eight bushels of wheat be reserved, where the power requires a reservation of a quarter (*r*).

With respect to the reversioner for the time being, the modes of reserving rent in leases under powers are various. It may be reserved to the lessor, and the person or persons who for the time being shall be entitled to the reversion of the premises under the limitations contained in the deed or will creating the power ; or it may be reserved generally during the term. The latter is the preferable mode, as the law will appropriate the rent to the person from time to time entitled to it (*s*). It is not unusual to find the reservation to the lessor and his heirs, or to him, his heirs and assigns, during the term ; but these, though unskilful, are not inoperative modes ; as the courts interpret such words by the prior title, and apply them to the person entitled under the will or settlement to the estate in remainder or reversion, and not

(*m*) *Orby v. Mohun*, 2 Vern. 531. 542 ; S. C. Pnce. Ch. 257 ; Gilb. Eq. Rep. 45 ; 3 Rep. in Ch. 102 ; Freem. Ch. 291 ; 1 Eq. Ca. Ab. 343. pl. 5 ; 16 Vin. Ab. 473. pl. 5. Gilbert's report is the best.

(*n*) *Duchess of Hamilton v. Mor-daunt*, 3 Bro. P. C. 248 ; Toml. ed. vol. 6, p. 145.

(*o*) *Muskerry v. Chinnery*, Lloyd & Goo. temp. Sugd. C. 185. 225.

(*p*) *Talbot v. Tipper*, Skin. 427.

(*q*) *Mountjoy's case*, 5 Co. 5, b., 5th resolution. *Orby v. Mohun*, Gilb. Eq. Rep. 60 ; 3 Rep. in Ch. 139.

(*r*) *Ibid.*

(*s*) *Whitlock's case*, 8 Co. 71, a. *Sacheverell v. Froggatt*, 2 Saund. 367.

to the heir of the lessor, unless he happen to be remainderman or reversioner (*t*). In all such cases, the words used are to be interpreted according to the title when the instrument is executed (*u*).

And in a late case (*x*), where lands were settled to the use of trustees for 1000 years, with remainder to B. for life, with remainder to other trustees for 2000 years, with remainder to C. for life, with power of leasing, it was held, that the trustees of the term of 1000 years might distrain for rent due by a lessee coming in under an exercise of the power, although the rent was reserved to the person or persons who for the time being should be entitled to the freehold or inheritance of the demised premises expectant on the decease of C.; for, though they were not entitled to an estate of freehold or inheritance in the technical sense of those terms, yet the reservation was not to be so confined; but that if they were entitled to the rent, the reservation was sufficient to give them the legal interest therein.

7. As to the right of re-entry on nonpayment of rent, &c.

Almost all powers of leasing provide, though in various terms, for the insertion in the lease of a clause to authorise the lessor to re-enter on nonpayment of rent; sometimes on nonpayment for a specified number of days; at others, in general terms; and occasionally the provision is altogether omitted from the power.

Where the power limits the period of indulgence to be allowed to the lessee, it is apprehended that an extension of it would prove a valid objection to the lease (*y*).

(*t*) Whitlock's case, 8 Co. 69, b., 2nd resolution. *Berry v. White*, O. Bridgm. by Bann. 104. 1 Co. 139, a. *Hotley v. Scott*, Loft, 316; S. C., nom. *Lord Tankerville v. Wingfield*, 7 Pri. 343, n.; 2 Brod. & Bing. 498; 5 J. B. Mo. 346; S. C. recognised by Ashhurst, J., under the name of Sir John Astley's Leases, Dougl. 572. 3 Mau. & Selw. 386. *Campbell v. Leach*, Ambl. 740. 746, 6th point. *Basset v. Basset*, Ambl., 2nd ed. by Blunt, 843, Appen-

dix, (P). *Isherwood v. Oldknow*, 3 Mau. & Selw. 382. *Jackson v. Innes*, 1 Bli. P. C. 115. *Sands v. Ledger*, 2 Ld. Raym. 792. *Rogers v. Humphreys*, 4 Adol. & Ell. 299; S. C. 1 Harr. & Wol. 625. *Hosier, or Hozier, v. Powell*, 1 Longf. & Towns. 2; S. C. 3 Irish Law Rep. 395.

(*u*) Ibid.

(*x*) *Rogers v. Humphreys*, 4 Adol. & Ell. 299; S. C. 1 Har. & Wol. 625.

(*y*) *Doe dem. Earl of Jersey v.*

But it appears that an abridgment of the period would not have the same effect. In *Coxe v. Day* (z), the power specified twenty-one days as the limit of indulgence, and in the lease the right of re-entry was made to accrue in twenty days, but no exception was taken to it on that ground. In *Doe dem. Vaughan v. Meyler* (a), where the power required a clause of re-entry for nonpayment of the rent for twenty-one days, and the lease was granted with a clause of re-entry in case of nonpayment for fifteen days, and no sufficient distress, it was admitted that the power was badly exercised. But in a late case (b), where a power was given to a tenant for life to lease such parts of an estate as had been anciently demised, so as the ancient and accustomed yearly rent and reservations were thereby reserved; all and every of such leases being from time to time made and granted in the same manner and form, and with and under such and the like reservations, restrictions, covenants, conditions, and agreements, as were usually and customarily contained in leases of the same kind in the several and respective parishes and places where the same premises were situated; and in the lease last preceding the one made under the power a right of re-entry was reserved in case the rent should be in arrear for twenty-one days; while that under the power gave the right of re-entry after twenty days; the court did not consider the lease objectionable on that ground, as the latter provision was more beneficial to the remainder-man.

Sometimes, as before observed, the power requires that the lease shall contain a clause for re-entry on nonpayment of rent, without referring to any particular time at which the right is to accrue: and it was formerly a question, whether the donee was obliged strictly to reserve the right of re-entry immediately on default in payment by the lessee, or whether

Smith, 7 Pri. 320; S. C. K. B. 5 Mau. & Selw. 467; in Exch. Chamb. 7 Pri. 281; 1 Brod. & Bing. 97; 3 J. B. Mo. 339; in House of Lords, 7 Pri. 379; 2 Brod. & Bing. 473; 5 J. B. Mo. 332; 3 Blf. 290.

(z) *Coxe v. Day*, 13 East, 118.

(a) *Doe dem. Vaughan v. Meyler*, 2 Man. & Selw. 276.

(b) *Doe dem. Douglas v. Lock*, 2 Adol. & Ell. 705. 741; S. C. 4 Nev. & Man. 307.

he might be allowed a period of indulgence ; and, if any, of what duration.

In the case of *Jones v. Verney* (*c*), where there was a power of leasing, so as in every such lease there should be contained a condition of re-entry for nonpayment of rent, and the provision in the lease was for re-entry on nonpayment of the rent in forty-two days after the days of payment, the judgment of the court rested on another ground; and as no objection was taken to the lease on account of its containing the qualified proviso for re-entry, it is submitted that no great importance can be attached to the case as an authority on either side.

But the point was settled after the most laborious argument and mature deliberation in the long-contested *Jersey* case, which was first determined in the court of King's Bench (*d*) ; thence carried on appeal to the Exchequer Chamber (*e*) ; and finally received the adjudication of the House of Lords (*f*) ; where the judgment of the court of King's Bench was affirmed, and that of the Exchequer Chamber reversed. An attempt, therefore, to supply the reader with a succinct statement of the facts, and of the arguments and opinions of the legal dignitaries who sat in judgment on the case, can require no apology, particularly as the decision has propounded a most important rule, not only tending to the establishment of numerous leases depending on similar circumstances, but, what is equally to be considered, furnishing a guide to the future conduct of the practitioner.

The facts of the case, set out on special verdict, were as follow :—Lady Louisa Barbara Mansel, being tenant for life of the premises in question, under her father's will, with divers remainders over, with a general power of revocation and new appointment, by her marriage settlement of the 2nd of July, 1757, having exercised the power of revocation, settled the

(*c*) *Jones* dem. *Cowper v. Verney*, Willes, 169.

(*d*) *Doe* dem. *Earl of Jersey v. Smith*, 5 Mau. & Selw. 467; Mich. Term, 1816.

(*e*) Same name, 7 Pri. 281; S. C. 1

Brod. & Bing. 97; 3 J. B. Mo. 339; Easter Term, 1819.

(*f*) *Smith v. Doe* dem. *Earl of Jersey*, 7 Pri. 379; S. C. 2 Brod. & Bing. 473; 5 J. B. Mo. 332; 3 Bl. P. C. 290;

A.D. 1821.

same, after the solemnization of the intended marriage, to the use of George Venables Vernon, the younger, afterwards Lord Vernon, for life, with remainder to the use of herself for life, with various remainders over; and the settlement contained a proviso in the words following:—

“ Provided (&c.), that it shall and may be lawful to and for
“ the said George Venables Vernon, and Louisa Barbara
“ Mansel, his intended wife, from time to time, during their
“ respective lives, when and as they shall respectively be in
“ possession of, or entitled to the perception of the rents and
“ profits of, the manors, messuages, lands, hereditaments, and
“ premises, so limited to them for their respective lives as
“ aforesaid, by indenture or indentures under their respective
“ hands and seals, attested, &c., to demise, lease, or grant,
“ such part or parts of the said manors, messuages, lands,
“ tenements, and hereditaments, or parts or shares of manors,
“ messuages, lands, tenements, hereditaments, and premises,
“ whereof they shall be so respectively in possession, or entitled to the perception of the rents and profits as aforesaid,
“ as are now leased for life or lives, or for years determinable
“ on the dropping of a life or lives, to any person or persons
“ in possession or reversion for one, two, or three lives, or for
“ any number of years, determinable on the dropping of one,
“ two, or three lives, so as there be not on any part or parcel of
“ the same premises to be demised, leased, or granted, respectively for a life or lives, or for years determinable on the
“ dropping of a life or lives, as before mentioned, any greater
“ estate or interest subsisting at any one time than what will
“ wear out or be determinable on the dropping of three lives;
“ and so as on every respective lease, demise, or grant, for a
“ life or lives, or for years determinable on the dropping of a
“ life or lives, there be reserved and made payable, during
“ the continuance of the estates and interests thereby to be
“ demised, leased, or granted respectively, the ancient and
“ accustomed yearly rents, duties, and services, or more, as
“ now are or at the time of demising or granting the premises
“ so to be demised, leased, or granted respectively, were

“ reserved or made payable for or in respect of the same premises respectively, or a just proportion of such ancient or the present reserved rents, duties, and services, or more, according to the value of the premises so to be demised, leased, or granted respectively, (except heriots, which shall or may be varied, altered, or compounded for, according to the will and pleasure of the said George Venables Vernon and Louisa Barbara Mansel); all such rents, duties, and services respectively, to be incident to, and go along with, the reversion and remainder of the same premises expectant on the determination of the said respective demises, leases, and grants thereof; and so as there be contained in every such lease a power of re-entry for nonpayment of the rent thereby to be reserved; and so as the respective lessees to whom such lease or leases shall be made as aforesaid be not by any express clause to be contained in any such leases respectively freed from impeachment of waste; and so as the said respective lessee or lessees to whom any such lease or leases shall be made respectively as aforesaid doth and do seal and deliver a counterpart or counterparts of such lease or leases respectively :

“ And also by indenture or indentures, under their respective hands and seals, attested as aforesaid, to demise, lease, or grant, all or any of the said manors, messuages, lands, tenements, hereditaments, and premises, so limited to them George Venables Vernon and Louisa Barbara Mansel for their respective lives, for any term or number of years absolute not exceeding twenty-one years, to take effect in possession, and not in reversion or by way of future interest; so as upon every such lease for an absolute term not exceeding twenty-one years there be reserved and made payable during the continuance of such lease or leases so much or as great and beneficial yearly and other rent and rents, and other services, proportionally, as now is and are therefore paid and yielded, or the best or most improved yearly rent and rents that can be reasonably had or obtained for the same, without taking any fine, premium, or fore-gift, or any

“ thing in the nature of or in lieu thereof, to be incident to
“ and go along with the reversion and remainder of the same
“ premises, expectant on the determination of the said respective leases; and so as the respective lessees to whom any
“ such lease or leases shall be made respectively as aforesaid,
“ be not expressly freed from waste; and do seal and deliver
“ counterparts of such leases respectively; and so as in every
“ such lease for any term of years absolute respectively there
“ be contained a clause of re-entry in case the rent or rents
“ thereupon to be reserved be behind or unpaid by the space
“ of twenty-eight days after the times thereby respectively
“ appointed for payment thereof:

“ And also by indenture or indentures, under their respective
“ hands and seals, attested as aforesaid, to demise, lease,
“ and grant, all or any part of the lands, hereditaments, and
“ premises, so limited to them the said George Venables Ver-
“ non and Louisa Barbara Mansel for their respective lives
“ as aforesaid, wherein or whereupon any mine or mines
“ now is or are open, or wherein or whereon any person or
“ persons shall be willing to open any mine or mines, sough
“ or soughs, or other thing or things whatsoever, which may
“ be requisite and necessary for the digging and getting of
“ lead or copper-ore or any metal or mineral whatsoever,
“ unto any person or persons, for any term or number of
“ years not exceeding thirty-one years, to take effect in pos-
“ session, and not in reversion or by way of future interest;
“ and so as upon every such lease for an absolute term not
“ exceeding thirty-one years there be reserved and made pay-
“ able during the continuance of such lease or leases such
“ part or share of the lead, copper ore, coal, and other pro-
“ duce, to be gotten from the said mines, or such yearly rent
“ or income in respect thereof, as can reasonably be had or
“ obtained for the same, without taking any fine, premium,
“ or fore-gift, or anything in the nature or in lieu thereof, to
“ be incident to and go along with the reversion and remain-
“ der of the said premises, expectant on the determination of
“ the said respective leases; and so as &c., [as before]; and

“ so as there be also inserted such proper and usual covenants
“ for the effectually winning and working the said mines,
“ and smelting the ore, and doing all other proper and
“ necessary acts, as are usually inserted in leases of the like
“ nature.”

It was found by the verdict, that, at the date of the settlement, and after, until the surrender of an existing lease at the making of the lease of 1803, on which the point in the case arose, the premises in question had been and were leased and were under and subject to a lease to certain persons for a term of years determinable on the lives of three persons: it was further found, that Lord Vernon, after the marriage, on the 5th of September, 1803, in consideration of the surrender of the existing lease, and of 105*l.*, and of the yearly rents, duties, payments, services, articles, covenants, provisoes, and agreements, thereafter specified, demised the premises for ninety-nine years, if the lessees and J. S. or either of them should so long live, at the yearly rent of 2*l.*, payable at Michaelmas and Lady-day by equal portions, together with one couple of fat capons on the 1st of January yearly during the term, or the sum of 1*s.* 6*d.* in lieu thereof, at the election and choice of the said Lord Vernon, his heirs or assigns, or the owner of the inheritance, and also an heriot of the best beast, or 40*s.* in lieu thereof, at the like election, &c., upon the death of every tenant dying in possession, and the like upon every assignment, sale, forfeiture, or alienation; and the lessees also yielding and doing constant suit of mill: and it was further found, that the lease contained a proviso for re-entry in the following words: “ Provided always, that if it shall happen at any time during
“ the estate hereby granted, that the said yearly rent or sum
“ of two pounds, and every or any of the duties, services, re-
“ servations, and payments, hereby reserved, or any part
“ thereof, shall be behind, unpaid, or undone, in part or in
“ all, by the space of 15 days next over or after any or either
“ of the days or times whereat or whereupon the same ought
“ to be paid, done, or performed, as aforesaid, and no suffi-

“cient distress or distresses can or may be had and taken
“upon the said premises, whereby the same and all arrear-
“ages thereof (if any be) may be fully raised, levied, and
“paid;” (or if the lessees do not repair within six months
“after notice; or do commit waste, or grind their corn at
“any other mill, or assign without licence;) “or if any default
“shall be by them the lessees, their executors, administra-
“tors, or assigns, made in the payment or performance of all
“or any of the [omitting the word *rents*] reservations, cove-
“nants, and agreements, hereinbefore on their parts con-
“tained, then and from thenceforth, in all, or any, or either
“of the said cases, it shall and may be lawful to and for the
“said George Lord Vernon, his heirs and assigns, and the
“person and persons to whom the freehold or inheritance of
“the premises shall as aforesaid belong, into and upon the
“said premises hereby demised, and into every part and parcel
“thereof, wholly to re-enter, and the same to have, hold,
“retain, possess, and enjoy, as in his and their former and
“proper estate, against [the lessees] their executors, admi-
“nistrators, or assigns; these presents or anything herein
“contained to the contrary thereof in any wise notwith-
“standing.”

The verdict further found, that the usual and accustomed form of leases of the estate contained in the marriage settlement of 2nd July, 1757, for lives or years determinable on lives, as well prior as subsequent to that settlement, was with a conditional proviso of re-entry similar to that in the indenture of 5th September, 1803.

When the case first came before the court of King's Bench, two points were made for the plaintiff; the first, that the lease of the 5th of September, 1803, was not a valid lease under the power given by the marriage settlement of Lord and Lady Vernon; and the second, that evidence ought not to have been received as to what had been the form of other leases of the estates contained in the said marriage settlement; and that the finding as to what had been the usual and accustomed form of other leases was wholly irrelevant. And,

under the first point, the lease was said to be void:—1, because the re-entry was restrained for fifteen days after the day of payment; and, 2, because it was restrained by a condition that a sufficient distress could not be had on the premises. For the present we may confine our attention to the objection taken on the ground of the fifteen days' forbearance being given to the lessee. In giving judgment on the case, the court of King's Bench observed, that the leasing power said, that the lease must contain *a* power of re-entry *for* non-payment of rent, not *on* non-payment of rent, nor to be exercised immediately upon the occurring of that default: that it was silent as to the time when it should be carried into effect; and being so silent, why should it not, (they asked,) in virtue of such silence, be intended that the creator of the power thought it enough to require that there should be some reasonable power of re-entry for non-payment of rent upon every lease, leaving it to the discretion of the person by whom it should be granted to prescribe when and under what circumstances that power of re-entry should in each particular case be enforced.

On appeal to the Exchequer Chamber, Barons Garrow, Wood, and Graham, supported the lease, while Justices Burrough and Park, Richards, L. C. B., and Dallas, L. C. J. C. P., denied its validity.

When the case came before the House of Lords, five judges, Dallas, L. C. J. C. P., and Justices Park, Holroyd, Burrough, and Richardson, were opposed to the lease: but Lord Eldon, C., Lord Redesdale, Abbott, L. C. J. K. B., Richards, L. C. B., who changed the opinion he had previously held in the Exchequer Chamber, Barons Graham, Wood, and Garrow, and Justices Bayley and Best, were in its favor.

The chief grounds on which the judges who were opposed to the lease rested their opinion were:

That the words of the power contained a clear and specific meaning, wanting no explanation, that the lease should contain a pure and simple clause of re-entry, and that a clause with a qualification of fifteen days' forbearance was more

prejudicial to the lessor, than a mere clause of re-entry on non-payment of rent (*g*) :

That the circumstance of the power requiring, in the case of leases not exceeding twenty-one years, a clause of re-entry with an indulgence of twenty-eight days, afforded an irresistible argument for excluding any such qualification from the power in question (*h*) :

That no discretion was to be allowed to the lessor, the very intent of the power in prescribing the requisites being to protect the several remainder-men from the discretion of the tenant for life in the exercise of the power (*i*) :

That what on the other side was termed a reasonable execution of the power could not be sanctioned, on account of the impracticability of ascertaining the reasonableness of the execution ; for it was not shown by whom the reasonableness was to be determined, whether by the parties to the deed, or a court, or jury ; nor by what definite rule they were to be guided in judging of its being reasonable (*k*) :

That there was no difference between the power prescribing a re-entry *on* non-payment of rent, or *for* non-payment of rent ; for although it was true that the word *for* often imported the purpose or object, and so it might be in the case in question if the words had been “ a power of re-entry *for* payment of the rent ;” yet that the same word *for* as often imported the cause or occasion of that which was predicated ; and that the words in the case in question must be taken to signify the same as either, “ because of,” “ by reason of,” “ on account of,” or “ in case of,” non-payment, meaning, when that event occurred, and being the same, therefore, as if the words were “ *on* non-payment of rent” (*l*) :

That the former leases were inadmissible in evidence. And they contrasted the different parts of the power to show that some parts referred to a pre-existing state of the property and to cases of former leases ; but that there was nothing in the

(*g*) 7 Pri. 306, 313, 367-8, 380, 417.

(*h*) 7 Pri. 309, 314, 369, 370, 384, 421, 431, 490.

(*i*) 7 Pri. 415.

(*k*) 7 Pri. 309, 371, 430, 444, 491-2.

(*l*) 7 Pri. 382, 416, 494.

proviso in question which admitted of a reference to such leases (*m*).

In answer to an argument, that the general clause for re-entry inserted in the lease in question was sufficient to satisfy the requisition of the power, it was said, that the word *rents* seemed to have been purposely omitted from that clause; that it could not be taken that the parties meant it to apply to a case which was before fully provided for according to the requisitions in the powers (*n*): and that it was a maxim that a subsequent general clause could not affect a preceding special clause (*o*).

On the other hand, the judges who argued in favor of the leases, urged, as their principal reasons:

That as the terms of the requisition in the settlement were that there should be contained in the leases *a* power, which they held to be equivalent to *some* power, indefinitely, of re-entry for non-payment of rent, and as in the lease a power of re-entry for non-payment of rent was reserved, there was a literal compliance with the terms of the power (*p*):

That the power was *for* non-payment, not *on* non-payment. That the latter word might perhaps have been considered as having reference to the time of the accrual of the right of re-entry, (if that had been the word used;) but that the word *for* must be taken to be used solely with reference to the *occasion* on which it was to be given (*q*):

That the donor of the power intended no more than that it should be substantially and reasonably exercised; and, with regard to the power requiring twenty-eight days' indulgence in leases at rack rents, that the omission to limit a time for payment in the power in question was evidence of his intention to leave it to the discretion of the donee to insert such a reasonable power of re-entry as should secure the payment of the rent to the reversioner (*r*):

(*m*) 7 Pri. 306. 317. 319. 320. 376.
383. 403. 413. 439. 489.

(*n*) 7 Pri. 311.

(*o*) 7 Pri. 316. 378. 422.

(*p*) 7 Pri. 445-6. 456. 460. 470. 519.

(*q*) 7 Pri. 461. 470.

(*r*) 7 Pri. 304. 319. 320. 457. 525

That fifteen days were a reasonable time, because in the next power twenty-eight days were allowed (*s*): indeed, that it might have been doubted whether the lease would not have been void for unreasonableness if the days of grace had not been allowed (*t*):

That no question could arise on the ground of reasonableness, as the law would judge of the reasonableness of the execution of the power, where no specific terms were expressed, as it would judge of the operation of the power itself (*u*); and that courts of law were sometimes required by the legislature to discover and decide questions upon the reasonable execution of powers; as in the case of the general inclosure act (*x*), where a rector or vicar is enabled to lease his allotment under certain restrictions mentioned in the act, and amongst others, under a restriction "that there be inserted in the lease power of re-entry on non-payment of the rent or rents to be thereby reserved within *a reasonable time*, to be therein limited, after the same shall become due" (*y*):

That the practice of the court of Chancery, the Chancellor being a judge both of law and equity, was to be considered in ascertaining the legal construction of the language of the power, and its legal effect; that practice being to allow a reasonable number of days by way of indulgence to the tenant: that in the event of a question coming before the court on a bill for a specific performance of an agreement to grant a lease under such a leasing power as the one in question, the Chancellor would, in pursuance of the established practice of his predecessors, direct the lease to be made with a power of re-entry, worded as the clause in question was, giving the tenant an extension of the time within which he must pay the rent (*z*):

That the practice of conveyancers, which was in harmony with that of the court of Chancery, was entitled to great weight (*a*):

(*s*) Ibid.

(*t*) 7 Pri. 450. 518, per Lord Eldon, and Bayley, J.

(*u*) 7 Pri. 319. 320. 333. 501.

(*x*) 41 Geo. 3. c. 109. s. 38.

(*y*) 7 Pri. 501.

(*z*) 7 Pri. 511. 512. 520. 527.

(*a*) 7 Pri. 476-7. 509. 523-4.

That as the power was in terms so general that nothing could be extracted from them, it must necessarily refer to something extrinsic; and, therefore, that reference to the former leases was justifiable as a criterion for the rents and covenants to be inserted in the new leases (*b*).

The like point arose in the case of *Doe v. Wilson* (*c*), and received the like adjudication. The power of leasing prescribed, in general terms, that in every lease there should be contained a condition of re-entry for non-payment of the rent thereby reserved; and the lease provided for a right of re-entry in case the rent should be unpaid by the space of twenty-eight days. Former leases of the premises had contained a similar provision. And the court, adhering to the decision in *Doe v. Smith*, determined that the lease was not objectionable on that ground.

And a very recent case (*d*), where, under a similar power, the right of re-entry was not reserved until default in payment for forty-two days, is to the same effect.

Hence it appears, that, where a power requires, in general terms, that the lease shall contain a clause of re-entry on non-payment of rent, the donee is invested with a discretionary power of fixing the time of re-entry; that this discretion is best exercised by adopting the term specified in former leases, where such leases exist; that such leases are admissible in evidence for the purpose of showing the conformity; and that, in the absence of previous leases, a reasonable time of indulgence may be allowed, consistently with the ordinary practice of conveyancers, and of the court of Chancery. What may be deemed the extreme limit of such reasonable indulgence is not determined: fifteen days were allowed in *Doe v. Smith* (*e*); twenty-eight, in *Doe v. Wilson* (*f*); while in *Doe dem. Wythe*

(*b*) 7 Pri. 303. 337. 349. 448. 458. 473. 516. 518. 530.

(*c*) *Doe dem. Earl of Shrewsbury v. Wilson*, 5 Barn. & Ald. 363, 4th point.

(*d*) *Doe dem. Wythe v. Rutland*, 2 Mees. & Wel. 661; S. C. Mur. & Hurl. 245; S. C., in error, nom. *Rutland v.*

Doe dem. Wythe, 5 Mees. & Wel. 688; and afterwards in the House of Lords, 12 Mees. & Wel. 355; and 10 Cl. & Fin. 419. The judgment of the courts below on this point was not reversed.

(*e*) Sup. p. 495.

(*f*) Supra.

v. Rutland (g), an indulgence of forty-two days was considered reasonable, the court observing that it was a reasonable time, for every one knew that forty-two days was such a portion of time as it was usual for a tenant to be allowed to pay his rent after it became due; though they held that, if, under the pretence of complying with the power in terms, the clause were of such a nature as to make the proviso for re-entry in effect wholly nugatory, the power would be contravened.

Where a power of leasing required that in every lease to be granted by virtue of it there should be contained the usual and reasonable covenants, and a condition of re-entry for non-payment of the rent thereby reserved, in case the same should be behind or unpaid by the space of twenty-one days, and for non-performance of the covenants therein to be contained, it was held, that a lease granted by the donee which contained a general covenant by the lessee to repair, and a proviso for re-entry in case the lessee should suffer the premises to run to decay, and should not sufficiently repair the same within six calendar months after notice, could not be supported as a due compliance with the power (*h*).

The right of re-entry reserved in the lease is sometimes made conditional on the event of a sufficient distress not being found upon the premises; or on the circumstance of the rent being previously demanded. The effect of such qualifications, where they are not prescribed by the power, remains to be seen.

It may be gleaned from the case of *Hotley v. Scott (i)*, that Lord Mansfield was of opinion that a power of leasing, "so as in each lease there be a clause of re-entry if the rent be unpaid for twenty-one days," was not badly exercised, although the lease prescribed that the rent should be first lawfully de-

(*g*) Sup. p. 505. And the term of indulgence in *Jones dem. Cowper v. Verney*, Willes, 169, was also forty-two days.

(*h*) *Doe dem. Lord Egremont v. Burrough*, 6 Q. B. 229.

(*i*) *Hotley v. Scott*, Lofft, 316. See

a note of the same case taken by Mr. Butler, under the name of *Lord Tankerville v. Wingfield*, 5 J. B. Mo. 346, n.; and 1 Brod. & Bing. 150, and 7 Pri. 343, n. The report by Lofft is scarcely intelligible. And see 7 Pri. 410.

manded, and no sufficient distress should be found on the premises.

But in the later case of *Coxe v. Day* (*k*), where there was a power of leasing “so as in every such lease there be contained a condition of re-entry for non-payment of the rent reserved by the space of twenty-one days,” and a lease was granted, with a proviso for re-entry in case the rent should be unpaid by the space of twenty days, &c., being lawfully demanded, and no sufficient distress could be found upon the premises; it was held that the proviso was not in conformity with the power.

Here, however, it is observable, that the execution of the power differed in three particulars from the terms of the power itself; 1st, in the circumstance of the twenty-one days prescribed by it being reduced to twenty; though this circumstance was not noticed either by the court or counsel; 2ndly, in the requisition of a demand of rent; and 3rdly, in the qualification respecting the distress. As the point came before the court on a case directed by the Master of the Rolls, the reasons of the decision are not given. It is, therefore, impossible to say what weight was attached to the first two circumstances; but Lord Ellenborough evidently thought that the lease would have been void on the last ground; for, during the argument, his lordship said, that there could be no doubt that it was more beneficial to the owner of the estate to have a power of re-entry at once upon the tenant upon non-payment of the rent within a certain time, than to have such a power only in case there should be no sufficient distress upon the premises from time to time as the rent should fall in arrear; and that the rent, in the one case, was to be secured from time to time by successive suits, with the risk of sureties if the distress should be replevied, while in the other, it was secured

(*k*) *Coxe v. Day*, 13 East, 118. See also *Doe dem. Vaughan v. Meyler*, 2 Mau. & Selw. 276. In the case of *Doe dem. Jersey v. Smith*, next noticed, Lord Eldon, L. C. J., Dallas, C. P.,

and Graham, B., said that *Hotley v. Scott* and *Coxe v. Day* were directly at variance, 7 Pri. 343-4. 375. 466. 484. 508.

once for all by the landlord's repossessing himself of the land out of which the rent was derived. It is, moreover, observable that the case of *Hotley v. Scott* was not referred to.

In this state of the authorities arose the great case of *Doe dem. Earl of Jersey v. Smith*, the particulars of which have already been very fully set out. On reference (*l*), it will be seen, that it was one of the terms of the power of leasing, that "there should be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved," and that the lease in dispute contained a proviso for re-entry if the rent should be unpaid by the space of fifteen days after the same ought to be paid, "and no sufficient distress or distresses could be had upon the premises whereby the same might be fully paid." The lease was objected to on the ground of the clause of re-entry being a departure from the power, not only, as we have seen (*m*), because the lessee was allowed fifteen days' indulgence for payment of his rent; but on account also of the right of re-entry being made dependent on the insufficiency of distress. The judges were divided in opinion upon this point, as upon the point of indulgence; but as much of the general reasoning upon the latter, already noticed, is applicable to the former, it will not be necessary to repeat it. On the one hand, the power was held to have been badly exercised, as the qualification of the distress was a clog or impediment prejudicial to the inheritance; and the case of *Rees v. King* (*n*), where a person was nonsuited in an ejectment on account of his omission to search every part of the demised premises for distrainable property, was urged as a practical exhibition of the prejudice the reversioner might sustain (*o*); and the cases of *Coxe v. Day* (*p*), and *Doe dem. Vaughan v. Meyler* (*q*), were said to be precisely in

(*l*) Ante, pp. 497. 499.

(*m*) Ante, p. 501.

(*n*) *Rees dem. Powell v. King*, For. 19.

(*o*) 7 Pri. 303. 310. 314. 380. 422. 493.

(*p*) Ante, p. 507. Park, J., said that *Coxe v. Day*, and the decision of the K. B. in *Doe dem. Jersey v. Smith*, were irreconcilable; 7 Pri. 436.

(*q*) Ante, p. 494.

point (*r*). On the other hand, the restraint as to the distress was considered reasonable, because the right of re-entry was reserved only for the purpose of securing the rent, and the statute of 4 Geo. 2 (*s*) had, previously to the lease in question being made, deemed it reasonable that lessors, where they had a power of re-entry for obtaining payment of the rent, should not enter whilst there was a sufficient distress on the premises (*t*). And they ridiculed the idea of there not being a sufficient distress to satisfy a rent of 2*l.* a year (*u*). And *Coxe v. Day* was said to be distinguishable from the principal case, on the ground of the re-entry in the former being for non-payment of the rent reserved by the space of twenty-one days; so that from the specification in the power of a particular mode, it might perhaps be inferred that no other qualification would be warranted; but that in the principal case there was no condition specified, nor time limited (*x*).

Judgment was ultimately given in the House of Lords in favor of the lease.

It would seem that the addition of a power of distraining, though not required by the power, would not prejudice the lease. This was the third objection raised in the case of *Doe v. Wilson* (*y*). The donee of the power made a lease which contained a provision, that if the said yearly rent should not be paid at the days and times appointed for payment, or if the said amerciaments, pains, fines, and penalties, nomine pœnæ, after reasonable demand in that respect made, should not be paid and satisfied, according to the true intent and meaning of the indenture, then it should be lawful for the said earl, [the lessor,] his heirs and assigns, into the said demised premises to re-enter, and distrain, and the distress and distresses to take, lead, drive, and carry away, detain,

(*r*) 7 Pri. 310. 315. 365. 373. 384.
410. 435-6-7. 493.

(*s*) 4 Geo. 2. c. 28.

(*t*) 7 Pri. 324-5. 339. 392. 450. 465.
479. 500. 521.

(*u*) 7 Pri. 304. 341. 450.

(*x*) 7 Pri. 335. 395. 467. 503-4. Best,

J., considered that *Coxe v. Day* had nothing to do with the question; but that *Hotley v. Scott* expressly decided the point.

(*y*) *Doe dem. Earl of Shrewsbury v. Wilson*, 5 Barn. & Ald. 363; and ante, p. 505.

and keep, until they or some of them be fully satisfied, contented, and paid. It appeared that a similar clause had been introduced into former leases. An objection was taken that it took away the right of the party to distrain previously to the demand of rent; and also, that when he had distrained, it took away the power of selling under the statute (z). This, however, the court denied, and held the lease to be in this respect a valid execution of the power; for, independently of the clause, the landlord had a power to distrain, and a power to sell under the distress; and that he was not abridged by it of any remedy for the recovery of his rent which he would otherwise have had; it being a rule of construction, that where a clause is introduced into a deed or into an act of parliament in order to confer a benefit, it is not to be construed so as to work a prejudice, or, in other words, that where the intention of the clause is to give a further right, it is not to be construed so as to take away any other right existing without it.

In a late case (a), a power was given to a tenant for life to lease such parts of certain premises as had been anciently demised, "so as the ancient and accustomed yearly rent and reservations were reserved, every such lease being made and granted in the same manner and form, and with and under such and the like reservations, restrictions, covenants, conditions, and agreements, as were usually and customarily contained in leases of the same kind, in the several and respective parishes and places where the same premises were situated." In the lease of the property immediately preceding the one in controversy, there was a right of re-entry in case the rent should be behind for a certain number of days, and no sufficient *overt* distress could be found upon the premises, or some part thereof, whereby to levy the same, while in the lease in question the word *overt* was omitted. But it was held, that the omission did not constitute a valid ground of objection;

(z) 2 W. & M. sess. 1. c. 5. s. 2.

Adol. & Ell. 705. 742; S. C. 4 Nev. &

(a) Doe dem. Douglas v. Lock, 2

Man. 307.

for so many opinions might be formed about the extent of the meaning of the word, that no legal meaning could be attributed to it.

It seems also, that a qualification of the right of re-entry on non-payment of rent, by a condition of the same *being lawfully demanded*, will not defeat a lease, though the power require, in general terms, a proviso for re-entry on nonpayment of rent.

A qualification of this kind, though not expressly authorised by the power, was contained in the lease in the case of *Coxe v. Day (b)*; but it is not known what influence that circumstance had with the court, as the judges merely certified their opinion that the lease was not made in conformity with the power. Indeed, it does not appear that the point was raised in argument.

But it underwent full discussion in the later case of *Doe v. Wilson (c)*, where there was a power of leasing at the usual and accustomed yearly rents, boons, and services, “so as in every such lease there be contained a condition of re-entry for nonpayment of the said rent, &c.,” and a lease was made with a proviso for re-entry in case the said rent should be unpaid by the space of twenty-eight days next after any or either of the respective feast-days and times whereon the same ought to be paid, *being lawfully demanded*. It appeared that a similar clause, with the words *being lawfully demanded*, was contained in a former lease of 1708. The court determined that the power was well exercised; and that, notwithstanding those words, the landlord had a right to the benefit of the statute of 4 Geo. 2. c. 28 (*d*), and might re-enter. “By the common law,” said Abbott, C. J., “the landlord never could re-enter without making a demand. Every clause of re-entry, therefore, contained the words *lawfully demanded*, in effect, though not in terms; and, therefore, in the lease of 1708, those words were quite nugatory. They were probably copied

(b) *Coxe v. Day*, 13 East, 118; ante, p. 507.

(c) *Doe dem. Earl of Shrewsbury v. Wilson*, 5 Barn. & Ald. 363. See also

Doe dem. Scholefield v. Alexander, 2 Mau. & Selw. 525.

(d) 4 Geo. 2. c. 28.

inadvertently into the subsequent leases, without considering their effect. I am of opinion, that such a proviso for re-entry, which was originally introduced for the benefit of the landlord, ought not to be construed, in consequence of the introduction of those words, (which were nugatory in the former leases,) to deprive the landlord of the benefit intended to be conferred upon him by the statute 4 Geo. 2. c. 28. The case might have been otherwise if the lease had contained an express covenant that he would not re-enter without demand, or that, having entered, he would not sell" (e).

Where a tenant for life with power to make leases of any lands usually let at any time before, in possession, for three lives, or any number of years determinable on three lives, reserving the rents then yielded, so long as the lessees, their executors and assigns, should duly pay the rents, and perform the conditions, according to the true meaning of their indentures of lease, made several leases for years determinable on three lives, and so long as the lessees, &c., using the exact words of the power, rendering the same several rents that were reserved, 12 Jac., payable at Michaelmas and Lady-day, it was held, that the limitation in the leases determined them on nonpayment of the rent without a demand; for *quamdiu*, *dum*, *dummodo*, were words of limitation, and distinguishable from a condition where a demand was necessary before a right of re-entry could be enforced (f).

In *Doe d. Bligh v. Colman* (g), the question was simply one of construction, and unaffected by any other decision. A power was given by will to a devisee for life to lease the premises in manner following: viz.—such parts of the said premises as had been usually granted or demised and were then in lease for any term of years determinable upon lives, to any persons, for the like terms, and in like manner, and under the like rents, services, and conditions, as the same

(e) 5 Barn. & Ald. 385.

(f) *Tustian dem. Gore v. Roper*, T. Jo. 27; S. C., nom. *Tristram v. Roper*, Vaugh. 23; S. C. *Temple v. Viscountess*

Baltinglass, Finch, 275.

(g) *Doe dem. Bligh v. Colman*, 1 Bing. 23; S. C. 7 J. B. Mo. 271.

had been usually granted; and the residue of the same premises, unto any persons for any term of years not exceeding twenty-one years in possession, at the best and most improved rent that could be reasonably gotten for the same, so as that no *such* demise or lease should be made dispunishable of waste, nor without a condition of re-entry on nonpayment of the rents or services thereby reserved. When the will was made, the premises were in lease under an indenture, dated in 1750, in consideration of a sum paid in hand, a yearly rent of 16*s.* 8*d.*, and 40*s.* for a heriot on the death of each cestui que vie. On the expiration of which, the devisee, in 1815, demised the premises in question to the defendant. With the exception of the names of the parties and cestuis que vie, and the amount of the sum paid in hand, the lease of 1815 was the same as the lease of 1750, neither of them containing any clause of re-entry for nonpayment of the heriot-service. It was argued that the word *such*, which immediately followed the specification of the two classes, and of the terms under which each should be disposed of, necessarily referred to demises of both the classes of land, and that the conditions which followed that word were equally imposed on demises of each; and, therefore, that the lease of 1815 was void, not being conformable to that clause of the power which required a re-entry for non-payment of 40*s.* in lieu of a heriot. But the court were of opinion, that the word *such* applied only to leases of the land last described; for if a power of re-entry for non-payment of the 40*s.* in lieu of a heriot had been inserted in leases of the land first described, that land would not in such case be let as the testator required it should be, for the like terms, in like manner, and under the like rents, services, and conditions as it had been usually granted.

8. As to the execution of a counterpart by the lessee, with a covenant for payment of rent, &c.

In almost all cases the power requires that the lessee shall execute a counterpart of the lease, the object of which is to furnish the lessor with the ready means of asserting and

enforcing his rights, by placing in his hands the evidence of the lessee's liability.

With a view to the lessee's security, and to satisfy parties claiming under him that the power has been complied with in this particular, a memorandum that a counterpart has been executed, should be indorsed on the original lease; such memorandum being signed by the lessor, and attested by the witnesses attesting the execution of the lease. In some acts of parliament empowering the grants of leases, and requiring counterparts, the receipt in writing of the lessor of the counterpart, signed by him, and indorsed on the lease, is made evidence of the execution of the counterpart (*h*).

The execution of the counterpart need not be contemporaneous with the lease (*i*).

9. As to the exemption from punishment for waste.

It is a common practice for the power to provide that the lessee shall not be made punishable for waste.

Where a power of leasing contained a restriction that there should not be contained in the lease a clause whereby any power or authority should be *given* to any lessee to commit waste, or whereby any lessee should be exempted from punishment for committing waste, a lease, comprising a covenant by the lessor to repair the mansion house, and a provision that in case of repairs being wanted on the roof, if the lessor, his heirs and assigns, should not repair the same within three calendar months after notice in writing of the defect, it should be lawful for the lessee, his executors, &c., to repair the same, and deduct the charges out of the rent reserved, was held not to be in violation of the power; for in fact no authority was *given* to the lessee to commit waste, nor was he exempted from punishment for committing waste, nor was there anything in the power to show that the burthen of repairing might not be cast on the landlord (*k*).

So, where a power of leasing provided that no clause should

(*h*) See 5 Viet. sess. 2, c. 27. s. 3. Ell. 403.
Ante, p. 263.

(*k*) Doe dem. Bromley v. Bettison,
(*i*) Fryer v. Coombs, 11 Adol. & 12 East, 305.

be contained in any of the leases giving power to the lessee to commit waste, or exempting him from punishment for committing the same, a lease made in pursuance of it was held not to be impeachable because it authorised the lessee to take down certain outbuildings, part of the demised premises, with a stipulation that the materials should be used in the erection of a new house, which the lessee covenanted to build upon the premises (*l*).

According to Sir Edward Sugden, C., a general power of leasing for any term, and without any words of restriction, will authorise a lease with a power to commit waste (*m*).

10. As to other covenants and conditions required by the power.

In the ordinary form of a power of leasing, the several particular covenants to be entered into by the lessee are not referred to; though it is usual to require that he shall execute a counterpart of the lease and thereby covenant for the due payment of the rent to be reserved. Sometimes, however, the power requires the insertion of all usual and reasonable covenants; or of the same covenants as are contained in previous leases of the same lands; or of such covenants as are usual in the part of the country where the lands are situate; but in a large majority of cases the power makes no mention of the covenants.

If the power prescribe that the lease shall contain usual and reasonable covenants, the insertion of a covenant on the part of the lessor to repair or rebuild in case of damage by storms, lightning, &c., and in default, that the lessee may quit the premises, and be discharged from the payment of rent, will vitiate the lease, as being an unusual and unheard of covenant. The covenant cannot be rejected; but the lease itself will be absolutely void (*n*). Nor will equity afford relief (*o*).

(*l*) Doe dem. Lord Egremont v. Stephens, 6 Q. B. 208.

Term Rep. 705; S. C. 3 Swanst. 685; cited, 1 Swanst. 353, n.

(*m*) Muskerry v. Chinnery, Lloyd & Goo. temp. Sugd. C. 185. 228.

(*o*) Medwin v. Sandham, 3 Swanst. 685.

(*n*) Doe dem. Ellis v. Sandham, 1

Where usual and reasonable covenants are directed to be inserted, in order to ascertain what covenants fall within those terms, the general rule is to take as a guide the lease in existence at the time of the creation of the power: if that be lost, the one preceding may be resorted to with the same view (*p*).

If the power authorise the letting of certain premises, for such term and terms, and under such rents, covenants, and agreements, as are agreed on by a certain instrument referred to, the omission of any of the covenants, particularly if in their nature they tend to the preservation, good management, and improvement of the premises, will be a valid objection to the lease (*q*).

Under a power of leasing, so as there should be inserted in every such lease such conditions, covenants, and restrictions, as were generally inserted in leases according to the usage of the country where the premises were situate, the donee granted a lease for twenty-one years, and, in consideration of 1000*l*. expended by the lessee on the property, covenanted at all times during his (the lessor's) life, to renew for twenty-one years, at the same rent, and under the same covenants, &c. This was found to be a usual covenant according to the custom of the country. But it was contended that it avoided the lease, because it operated indirectly upon the interest of the remainder-man, though it only bound the tenant for life directly, as having a tendency to induce the lessor to run the question on the quantum of rent reserved very closely; for if he renewed at the end of twenty years from the first granting of the lease, the remainder-man might have a lease fixed on him for twenty-one years from that time, reserving less than the best rent that could have been reserved; but the answer of the court was, that, if the fact were so, the lease would be void, and the remainder-man might bring an ejectment (*r*).

(*p*) *Doe dem. Lord Egremont v. Stephens*, 6 Q. B. 208.

(*q*) *Earl of Cardigan v. Montagu*, Sugd. Pow. 6th ed., Appendix, No. 14, p. 600. 602-3, 4th, 7th, and 8th points.

Reg. Lib. 1754. fol. 406.

(*r*) *Doe dem. Bromley v. Bettison*, 12 East, 305. A covenant to renew is a clause usually inserted in leases in Nottingham. *Ibid*.

If the power of leasing contain a proviso requiring the insertion of such covenants as are usually inserted in leases in the country where the lands lie, a lease made with a proviso in the very words of the power, will not be good; nor can it be aided by any special verdict, finding the covenants usual (*s*).

Where the power is silent with regard to the covenants to be introduced into the lease, it seems, that if, upon the whole, the burthen taken upon himself by the lessor is counter-balanced by new stipulations in his favor entered into by the tenant, a variation from the covenants contained in former leases will not vitiate the exercise of the power (*t*).

Although the power do not in words require that the lease shall contain any covenants, yet the absence of a covenant for payment of rent will defeat it, as the rent under a mere reservation is not payable till entry, and, therefore, in fact may never be payable during the term; or the lease may be assigned to a succession of beggars, and, thus, the only remedy may be against the land, which may not contain the means of satisfying a distress (*u*).

Where a lease for lives was made by a tenant for life under a power, and after the decease of the cestuis que vie, and of the lessor, the remainder-man, by a deed poll, executed by him and the lessee also, and affixed by sealing wax to the original lease, renewed the annexed indenture for a new term, subject, however, to the payment of 100*l.* yearly, and subject to the covenants in the lease mentioned, and the lessor covenanted that the lessee, paying the reserved rent, and performing the covenants *herein* contained, should peaceably enjoy, it was held, that these words did not constitute a covenant by the lessee with the lessor in the second lease for payment of rent (*x*).

(*s*) Orby *v.* Mohun, Gilb. Eq. Rep. 60; S. C. ut ante, p. 492. n. (*m*).

(*t*) Goodtitle dem. Clarges *v.* Fumecan, 2 Dougl. 565.

(*u*) Nugent dem. Atkins *v.* Sealy, Alc. & Nap. 359. Taylor dem. Atkins *v.* Horde, 1 Burr. 60. 125.

(*x*) Nugent dem. Atkins *v.* Sealy,

Alc. & Nap. 359. And see Burnett *v.* Lynch, 5 Barn. & Cres. 589; S. C. 8 Dow. & Ry. 368; and Steward *v.* Wolveridge, 9 Bing. 60; S. C. 2 Mo. & Sc. 75; S. C. Wolveridge *v.* Steward, in error, 3 Mo. & Sc. 561; S. C. 1 Crompt. & Mees. 644; 3 Tyrw. 637.

A. B., being invested by an act of parliament with a power of granting building leases, granted a lease, professed to be made in pursuance of the power, but the only covenant that in the least related to rebuilding was one:—"that the lessee should, at his own charges, during the term, repair, uphold, maintain, and keep, the messuages and premises demised, or such other messuage or buildings as should during the term be built on the premises, in by and with all and all manner of needful and necessary reparations and amendments, when and so often as need should be and require, and should leave them so at the end of the term;" and it was held, that this could not be considered a building lease within the meaning of the act, no power being given to the lessee to pull down and rebuild any part of the premises, nor any obligation to do so, nor any covenant for that purpose, being contained in the lease; that the covenant to repair and uphold could not imply a covenant to build (*y*); and, further, that the fact of the lessee having voluntarily built on the premises would not give validity to the lease, the rule of law being, *quod initio non valet tractu temporis non potest convalescere* (*z*).

And a similar point occurred in a later case (*a*). A tenant for life had a power of leasing all or any part of the messuage and premises in question, for the purpose of new building, or effectually rebuilding and repairing any messuage, houses, outhouses, edifices, or buildings, then standing or being, or thereafter to stand and be, upon any of the said hereditaments and premises, for any term not exceeding sixty-one years, at the best rent, without fine: And he was also empowered, for any other reasonable purpose, to demise the premises for any term not exceeding twenty-one years, to take effect in possession, at rack rents, so that the leases should contain such covenants, clauses, and restrictions, as were usual in leases of houses at rack rents in London. The will also contained a clause, that if any person taking a life

(*y*) *Jones dem. Cowper v. Verney*,
Willes, 169. *Molesworth v. Howard*,
 2 Col. V. C. 145.

(*z*) *Ibid.*
 (*a*) *Doe dem. Dymoke v. Withers*,
 2 Barn. & Adol. 896.

estate should not keep the estates in good repair, a trustee might enter, and apply the rents and profits in putting them in repair. Under this power, the tenant for life, in consideration of the great charge which the lessee would be at in effectually repairing the messuage, tenement, and premises, and also of the rent reserved, and of the covenants, conditions, and agreements, on the lessee's part, demised the premises for sixty-one years, at the yearly rent of 27*l.*; and the lessee covenanted to expend 250*l.* at least for the purpose of effectually repairing the premises, and putting them into complete and substantial repair, and when the said premises should be well and effectually repaired, at all times during the term as often as need should be well and effectually to repair and uphold the premises, and all buildings &c. to be erected thereon: It was also provided, that the lessee might determine the lease at the end of thirty-one years, giving notice, and performing all the covenants. There was no express covenant on the part of the lessee to new build or repair any part of the premises. The value of the premises at a rack rent (exclusive of land-tax and sewer's-rate) was 100*l.* a year. It was held, that the lease was not warranted by the power, as the covenant to lay out 250*l.* at least in effectually repairing the premises, was not equivalent to a covenant, which the lease should have contained, effectually to rebuild and repair; and this construction was said by Mr. Justice Taunton to be strengthened by the terms of the other power; for if the testator meant to require nothing more than the common covenant to repair usually inserted in leases of houses in London, there was no difference as to the extent of obligation imposed between the power to demise for sixty-one, and that for twenty-one years.

11. As to the effect of the execution of the power.

When a power of leasing is exercised, the instrument conferring the estate operates as an appointment of a use in favor of the lessee, or rather appointee, which is served out of the seisin of the feoffees, releasees, or devisees, to uses under the settlement or will creating the power, and is invested with the

properties of a legal estate by the statute of uses (*b*). The lessee, or appointee, is then supposed to derive his estate from the donor, and not the donee, of the power (*c*). And when we find it said that the estate of the lessee in such a case is derived out of the estate of tenant for life, for such period of the term as he may happen to live (*d*), it would probably be more correct to say that it operates upon that estate, than to say that it is derived out of it, even during that period (*e*).

It may be stated as a general rule, that the estate of the lessee or appointee supersedes all the limitations in the instrument creating the power, and places him in the same situation as if his term had been the first originally limited by it. Thus, where lands were limited to Sir J. F. for life, and then to trustees for ninety-nine years if A. B. should so long live, upon such trusts, &c., as Sir J. F. should direct, with remainders over, with power to him to make leases, and Sir J. F. afterwards declared the trusts of the term, and then exercised his power of leasing, it was objected that as he had declared the trusts of the term for payment of his debts, the estate was bound by it, and he could not afterwards execute his power of leasing; but it was held, that the term was originally subject to the power, being contained in the same deed; and that, on the exercise of it, the lease was precedent to the term, and controlled it (*f*).

So, where an estate was settled to the use of I. S. for fifteen years, and after to the use of the settlor for life, with a power of leasing, it was contended that the power could not be exercised till the expiration of the fifteen years; but it was held, that the power issued out of the whole estate, and was immediately exercisable, and that the term of fifteen years was presently subject to it; but that I. S. should have for the

(*b*) 27 Hen. 8. c. 10.

(*c*) Whitlock's case, 8 Co. 69, b. 71, a.

(*d*) See *Berry v. White*, O. Bridgm. by Bann. 91. *Grange v. Tiving*, O.

Bridgm. by Bann. 115.

(*e*) *Long v. Rankin*, Sugd. Pow., Appendix, No. 2, 6th ed. vol. 2, p. 539. 546, per Abbott, L. C. J.

(*f*) *Talbot v. Tipper*, Skin. 427.

remainder of the fifteen years the rent reserved in respect of the lease granted under the power (*g*).

In a very recent case (*h*), certain premises were settled to the use of H. and L. for 1000 years; with remainder to the use of E. R. for life; with remainder to the use of T. L. for 2000 years, to commence from E. R.'s decease, or other sooner determination of her estate; with remainder to such uses as M. R. should appoint; in default of appointment, to the use of M. R. for life; with divers remainders over: And it was declared that the term of 1000 years was limited to H. and L., upon trust, on non-payment, on the 25th of March then next, of 800*l.* and interest lent by I. H. to M. R., by sale, mortgage, or other disposition of the premises, at the request of I. H., to levy and pay to him the 800*l.* and interest: And as to the term of 2000 years, that it was limited to T. L. upon trust to levy, in the same manner, such sums as E. R. should, during her life, pay to I. H. for interest on the 800*l.*, and also a further sum of 600*l.*, and to pay the same in manner therein mentioned; and upon further trust to permit the person next in remainder or reversion expectant on the term of 1000 years to receive the residue of the rents and profits remaining after and not applied in execution of the trust declared of the last mentioned term; with a proviso that when the trusts of the two terms should have been executed, and the costs of the trustees paid, the two terms should cease: And it was declared that it should be lawful for E. R. to demise the premises for any term not exceeding ten years from the date of the indenture of settlement, or seven years from the day of her decease, to take effect in possession. E. R., by virtue of the power, demised the premises to the plaintiff for the term of seven years, to be computed from the day of her decease, at the yearly rent of 150*l.*; and it was determined, that the lease, being made under a power, was referable to the instrument creating the power, and in point

(*g*) Fox v. Prickwood, 2 Bulstr. 216;
S. C. Cro. Jac. 347, numbered in fol.
ed. 349, by mistake; S. C. Anon. 1 Rol.

12. 2 Rol. Ab. 260. pl. 5.
(*h*) Rogers v. Humphreys, 4 Adol.
& Ell. 299; S. C. 1 Harr. & Wol. 625.

of law contemporaneous with the mortgage in favor of I. H., though in fact not made till nearly a year after it, and binding on the trustees of the 1000 years' term, so that they could not disturb the lessee in the enjoyment of the land.

Persons claiming in remainder under a settlement conferring a power of leasing on the tenant for life, may, by virtue of the statute of 32 Hen. 8. c. 34 (*i*), take advantage, as assigns of the reversion, of the lessee's covenant for payment of rent, and other covenants in their nature running with the land, though entered into with the tenant for life, his heirs and assigns; as the lease derives its effect from the donor, and not the donee, of the power, and the remainder-man is, in legal contemplation, the assignee of the person who, also in legal contemplation, is the lessor (*k*).

It is no objection to a lease under a power that it is in trust for him who executes the power, provided the legal tenant be bound during the term in all requisite covenants and conditions (*l*).

12. As to the consequences of a defective execution of the power.

A lease inoperative as an exercise of a power may sometimes take effect out of the estate of the donee.

If a party having a naked power only make a lease not warranted by it, the lease is absolutely void at law, and not merely voidable (*m*); for the estate, depending solely for its existence on the due exercise of the power, necessarily fails when the provisions of the power are not complied with (*n*).

(*i*) 32 Hen. 8. c. 34, "Concerning grantees of reversions to take advantage of the conditions to be performed by the lessees."

(*k*) *Isherwood v. Oldknow*, 3 Mau. & Selw. 382, 3rd point. *Berry v. White, O. Bridgm. by Bann.* 82. 103. *Whitlock's case*, 8 Co. 69, b. *Goodtitle v. Funnear*, 2 Dougl. 565. 572. *Rogers v. Humphreys*, 4 Adol. & Ell. 299; S. C. 1 Har. & Wol. 625. *Hosier, or Hozier, v. Powell*, 1 Longf. & Towns.

2; S. C. 3 Irish Law Rep. 395.

(*l*) *Taylor dem. Atkins v. Horde*, 1 Burr. 60. 124. *Wilson v. Sewell*, 4 Burr. 1975. 1979. *Right dem. Basset v. Thomas*, 1 W. Blac. 446. 449; S. C. 3 Burr. 1441.

(*m*) *Doe dem. Cowper v. Verney*, Willes, 177.

(*n*) See as to the aid afforded in equity in cases of defective executions of powers, ante, p. 408.

But frequently, if not generally, it happens that the donee of a power of leasing has also, as tenant for life or tenant in tail, an actual estate in the property. Under these circumstances, a lease which is void as an informal or defective execution of his power may be supported out of such estate (*o*). And if the ultimate remainder or reversion devolve on the lessor, neither he, nor his heir after his death, can avoid the lease (*p*).

If, however, a party contracting with a tenant for life, the donee of a power of leasing, be apprized of the incapacity of the donee to grant the lease agreed for, he cannot, by the assistance of Chancery, obtain a lease derived out of the donee's interest, and determinable on his life, the contract being originally for a lease which would be a fraud on the settlement (*q*). Such a case does not fall within the principle, that where a person contracts to grant a certain interest, which it afterwards appears he cannot carry into execution to the extent he agreed to do, yet the grant shall be made available as far as his interest will permit, as where a person contracts for the sale or grant of a lease of an estate, and it afterwards turns out that he is not entitled to part of it, that then the contract may be enforced as to the part of which the grantor is owner (*r*). So, if a tenant for life with power of leasing cannot grant a lease upon the terms agreed on, so as to bind the inheritance, the court will not decree a specific performance, by directing the execution of an invalid lease, which may incumber and embarrass those entitled to estates in remainder (*s*).

If the lease be void by the defective execution of the power, or the determination of the estate by which it was supported, as the death of tenant for life, it is incapable of confirmation by those in remainder, so as to give it stability as a good legal

(*o*) *Bowes v. East London Waterworks Company*, Jac. 326.

(*p*) *Taylor v. Stibbert*, 2 Ves. jun. 437.

(*q*) *O'Rourke v. Percival*, 2 Ball & Beat. 58.

(*r*) *Ibid.*

(*s*) *Ellard v. Lord Llandaff*, 1 Ball & Beat. 241. 251. *O'Rourke v. Percival*, sup. *Byrne v. Acton*, 2 Bro. P. C. 390; *S. C. Toml. ed. vol. 1*, p. 186. *Jour. Vol. 21*, p. 701.

lease (*t*). But though it be actually void, acceptance of rent by the remainder-man, or other recognition of a subsisting tenancy, will place the lessee in the position of a tenant from year to year, and entitle him to a notice to quit (*u*).

In equity, however, where the situation and conduct of the parties are more liberally regarded, the lessee may, under particular circumstances, be quieted in the possession of the property for the term contracted for. Thus, where a tenant for life with power of leasing granted (but not conformably to his power) a building lease for sixty-one years, and the assignee of the lease laid out above 5000*l.* in buildings, and, after the death of the tenant for life, the remainder-man in tail, who had continued to receive the rent for six years, brought an ejectment, and recovered at law, on the ground of the defective execution of the power, it was held by Lord Hardwicke, that the remainder-man, by lying by, and with notice suffering the lessee or assignee to rebuild, had bound himself from controverting the lease; and he decreed the execution of a new lease with proper and usual covenants for the residue of the term; and, on executing the lease, his lordship decreed the lessee to enjoy the premises quietly against the defendant (*x*).

A similar decree was made, as we have seen (*y*), in the case of an agreement, where the remainder-man knowingly suffered the tenant under a defective instrument to lay out money without giving him notice of his intention to impeach his title (*z*).

(*t*) Doe dem. *Simpson v. Butcher*, 1 Dougl. 50. *Goodright dem. Wynne v. Humphreys*, 1 Dougl. 52, n. *Jenkins dem. Yate v. Church*, Cowp. 482. Doe dem. *Potter v. Archer*, 1 Bos. & Pul. 531. *Stiles v. Cowper*, 3 Atk. 692. *Bowes v. East London Waterworks Company*, Jac. 331. Doe dem. *Cowper v. Verney*, Willes, 177.

(*u*) Doe dem. *Martin v. Watts*, 7 Term Rep. 83; S. C. 2 Esp. N. P. C. 501. Doe dem. *Collins v. Weller*, 7 Term Rep. 478. Roe dem. *Brune v.*

Prideaux, 10 East, 158, 188. Doe dem. *Tucker v. Morse*, 1 Barn. & Adol. 365, overruling *Goodtitle dem. Adcane v. Prentice*, Esp. Dig. 464.

(*x*) *Stiles v. Cowper*, 3 Atk. 692. And see *Cooper v. Denne*; *Denne v. Cooper*, 1 Ves. jun. 565; S. C. 4 Bro. C. C. 80. *Attorney-General v. Balliol College, Oxford*, 9 Mod. 411. *East India Company v. Vincent*, 2 Atk. 33.

(*y*) Ante, p. 409.

(*z*) *Shannon v. Bradstreet*, 1 Scho. & Lef. 52, 73.

And a purchaser from the remainder-man, with notice of the lease, is bound in like manner (*a*).

It is clear, however, that the acts of one tenant for life in allowing expenditure in improvements cannot prevent those in remainder from availing themselves of the imperfection of the lessee's title (*b*).

Where a tenant for life with power of leasing granted a defective lease to a party who had no notice of the power, or that the lessor was tenant for life only, equity refused to restrain the lessee from setting up an old outstanding term, in opposition to an ejectment brought by a remainder-man (*c*).

If trustees of the legal estate, with a limited power of granting leases, exceed their authority, either by taking fines, where the receipt of fines is prohibited, or by leasing in reversion, where leases in possession only are allowed, although the estate of the trustees would support the leases at *law* for the whole term granted, yet they will be set aside in equity at the suit of a remainder-man who has done no act to preclude his claim (*d*).

5thly, and finally, As to the extinguishment and suspension of the power.

A few words on the extinguishment and suspension of powers of leasing remain to be added.

Where a power of leasing given to a tenant for life is appendant, that is, if a lease made by virtue of the power will take precedence of the tenant for life's own estate, an absolute alienation of the life estate will extinguish the power (*e*); but it is otherwise where the power is in gross, as to make leases to commence after the donee's death (*f*).

(*a*) *Steele v. Mitchell*, 2 Dru. & Wal. 568; S. C. 3 Irish Eq. Rep. 1.

(*b*) *Bowes v. East London Waterworks Company*, 3 Madd. 375; S. C. Jac. 324. 332.

(*c*) *Goleborn v. Alcock*, 2 Sim. 552.

(*d*) *Bowes v. East London Waterworks Company*, 3 Madd. 375; S. C. Jac. 324. *Attorney-General v. Griffiths*, 13 Ves. 530.

(*e*) *Berry v. White*, O. Bridgm. by Bann. 91. *Grange v. Tiving*, O. Bridgm. by Bann. 115. *Ren dem. Hall v. Bulkeley*, 1 Dougl. 292-3. *Cooke v. Bromehill*, Noy, 66, a very confused report.

(*f*) *Edwards v. Slater*, Hardr. 410, per Hale, C. B., and Rainesford, B.; *Turner, B.*, cont.

So, where a party was a lessee for twenty-one years under the Archbishop of Canterbury, and a power was given by act of parliament to the archbishop and his successors, and to the lessee, his executors, administrators, and assigns, jointly, to grant building leases, it was held, that the surrender of his old term, and acceptance of a new one, extinguished his power of leasing; and, therefore, that a person not coming in by assignment of the original lease, but deriving the tenant-right of renewal under an assignment of the renewed lease, could not exercise the power (*g*).

So, a power of leasing given to a tenant for life is suspended during the continuance of a lease granted by him out of his estate (*h*).

But though a power of leasing may become void if the donee part with his estate to which it is annexed, the courts will not hold it to be extinguished by a transfer of the estate, unless they clearly see in the language of the deed whereby the power is created that the donor intended inseparably to annex it to the estate given, and to a continuance of that estate in the identical person to whom it is given (*i*).

Thus we have seen (*k*) that a power reserved to a tenant for life in possession to lease for twenty-one years is not extinguished by a conveyance of his life estate by lease and release to a trustee, upon trust to apply the profits in payment of an annuity, during the donee's life, and the surplus to the donee, the object of the conveyance being only to let in a particular charge, subject to which the rents and profits belong to the tenant for life (*l*).

In a late case (*m*), certain lands were devised to M. and B. in fee, to the use of the testator's son, James, for life, with power to M. and B. to raise money by mortgage of his real estate in fee or for years; and a proviso that it should be lawful

(*g*) *Collett v. Hooper*, 13 Ves. 255.

(*h*) *Attorney-General v. Gradyll*, Bunb. 92.

(*i*) *Long v. Rankin*, Sugd. Pow., 6th ed., Appendix, No. 2.

(*k*) *Ante*, p. 405.

(*l*) *Ren den. Hall v. Bulkeley*, 1 Dougl. 292. And see *Long v. Rankin*, sup. But see *Vincent v. Ennys*, and *Corker v. Ennys*, 3 Vin. Ab. 433. pl. 10.

(*m*) *Bringloe v. Goodson*, 4 Bing. N. C. 726; S. C. 6 Scott, 502; 1 Arn. 322.

for the person entitled to the rents and profits for the time being, and, during the minority of such person, for the testator's executors, to lease the premises in a manner there prescribed, at a rack rent, for any term not exceeding twenty-one years, to take effect in possession. In 1812, after the testator's death, James, without noticing his power, demised the premises to one Clement for ninety-nine years if he (James) should so long live. On the 31st of December, 1814, James, by virtue of the power, made a lease to the defendant from the 11th of October then last past for twenty-one years, at a yearly rent of 1,500*l.*, and the further yearly rent of 10*l.* for every acre managed contrary to the covenants in the indenture. On the 14th of June, 1828, B., who had survived M., by virtue of the power, mortgaged the premises for the term of 1000 years to the plaintiff, who, as assignee of the reversion, sued the defendant for the additional rent alleged to have accrued due by breach of the husbandry covenants contained in his lease. The court held that there had been no suspension of the leasing power given to the tenant for life, so far as regarded the grantee of the term under the power to demise by way of mortgage given to the executors, and that such grantee had the immediate reversion in him, and might sue upon the covenants in the lease granted to the defendant.

We have already seen that a power of leasing given to a feme sole is not suspended by her subsequent marriage (*n*).

Whether a power of leasing contained in a will is revoked, as to a particular devisee, by a codicil, must be ascertained, not from the mere alteration by the codicil of the order in which the parties were originally to take, nor from the position of words conferring the power, but from the whole will and codicil taken together (*o*).

(*n*) Ante, p. 401. *Bayley v. Warburton*, Com. 494.

S. C. nom. *Foster v. Grayham*, 2 Barnard. K. B. 341. 428.

(*o*) *Forster v. Graham*, 2 Stra. 962;

CHAPTER II.

WHO MAY BE LESSEES.

THE capacity of taking as lessee now claims our attention, and we may consider who may be lessees, as we did in treating of lessors :—

I. With reference to personal capacity.

II. With reference to estate.

III. With reference to number and connection : and,

IV. With reference to office ; premising, generally, that the lessee must be in existence and ascertained at the time of the demise, or it will be void, as if it be granted to the executors of a man who is living (*a*), or to such person as another party shall name (*b*).

SECTION I.—WITH REFERENCE TO PERSONAL CAPACITY.

1.—*Infants*.

A lease granted to an infant is not void, unless, perhaps, it be obviously prejudicial to his interest (*c*), but is voidable by him on attaining his majority (*d*) ; though, in order to escape from the burthen of the rent, he must express his dissent in a reasonable time, and, it is apprehended, before the arrival of the

(*a*) Anon. 3 Leon. 32, case 60.
 Porry, or Pory, *v.* Allen, Cro. Eliz.
 173; S. C., nom. Perryn *v.* Allen, Ov.
 97. Snow *v.* Cutler, T. Raym. 162-3.
 (*b*) Sparke *v.* Sparke, Mo. 666.
 (*c*) Kirton *v.* Elliott, 2 Bulstr. 69;
 S. C., nom. Ketsey's case, Cro. Jac.
 320. Baylis *v.* Dineley, 3 Mau. &
 Selw. 477. 481. And see Lloyd *v.*

Gregory, Cro. Car. 502; S. C. W. Jo.
 405; but query.

(*d*) Kirton *v.* Elliott, Ketsey's case,
 sup. Evelyn *v.* Chichester, 3 Burr.
 1719. Holmes *v.* Blogg, 8 Taunt. 35.
 508. 510; S. C. 1 J. B. Mo. 466; 2 Mo.
 552. 1 Rol. Ab. 731. l. 45. Co. Lit.
 2, b.

day of payment (*e*). Where so much must depend on circumstances, it is scarcely possible to fix any period as a reasonable one in all cases. In *Holmes v. Blogg* (*f*), Dallas, C. J., observed, that he should be disposed to hold, that an infant omitting to give notice of disaffirmance within four months after attaining his majority could not be regarded as giving notice within a reasonable time. It appears, however, that the lessor, by treating the lease as ended, may dispense with notice of disaffirmance in a formal shape (*g*).

Should the lessee elect to annul the lease, he cannot recover the consideration paid for it, though subsequent events may effect a complete failure of the object for which such consideration was given (*h*).

It seems that a lease not under seal (*i*) granted to an infant cannot be confirmed by him, so as to render him liable for rent accrued during infancy, otherwise than by writing; the statute of 9 Geo. 4. c. 14, having provided (*k*), that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith.

A late act of parliament (*l*) empowers an infant entitled to any lease, or his guardian or other person on his behalf, by the direction of the court of Chancery in England, and of the courts of equity of the counties Palatine of Chester, Lancaster, and Durham, as to land within their respective jurisdiction (*m*), to

(*e*) *Kirton v. Elliott*, Ketsey's case, sup.

(*f*) *Holmes v. Blogg*, 3 Taunt. 39. 40; S. C., 1 J. B. Mo. 466. 473. And see *Doe dem. Bromfield v. Smith*, 2 Term Rep. 436.

(*g*) *Holmes v. Blogg*, sup.

(*h*) *Ibid.* 2 Eden, 72. Wilms. 226, note.

(*i*) But all leases of tenements and

hereditaments required by law to be in writing, if made after 1st October, 1845, are void at law unless made by deed; 8 & 9 Vict. c. 106. s. 3.

(*j*) 9 Geo. 4. c. 14. s. 5.

(*l*) 11 Geo. 4. & 1 W. 4. c. 65. s. 12.

(*m*) And also of the courts of Great Session of the Principality of Wales, before their abolition by 11 Geo. 4. & 1 W. 4. c. 70. s. 14.

surrender such lease, and to take a new lease for the term comprised in the original lease. More of this subject, however, will be found in a future chapter relating to Renewals.

II.—*Persons of Unsound Mind.*

Idiots and lunatics, it should seem, may take leases for their benefit (*n*). And the statute just cited (*o*) enacts (*p*), that where any person being lunatic (which term extends (*q*) to any idiot or person of unsound mind, or incapable of managing his affairs,) shall become entitled to any lease, it shall be lawful for his committee, by direction of the Lord Chancellor, to surrender such lease, and take, in the name and for the benefit of the lunatic, a new lease for the term originally granted by the surrendered lease. But for further information on this subject the reader is referred to the chapter on Renewals (*r*).

III.—*Feme sole.*

A feme sole may be a lessee; but if she afterwards marry, her responsibilities in that character will devolve on her husband, who will be liable, as well after his wife's death, as during the coverture, to an action for arrears of rent, although the lease may have expired (*s*).

The wife may be joined with the husband as defendant in an action for breach during the coverture of a covenant in a lease made to her while single (*t*).

(*n*) Co. Lit. 2, b.

(*o*) 11 Geo. 4, & 1 W. 4, c. 65.

(*p*) Sect. 13.

(*q*) Sect. 2.

(*r*) Post, Part the Sixth, Chap. VII.

(*s*) Vane v. Minshall, 1 Lev. 25;

S. C., nom. Fane v. Minshaw, 1 Keb.

20, 22; S. C., nom. Payne v. Minshall,

T. Raym. 6. Anon. 6 Mod. 239. Rol.

Ab. Baron and Feme, (G). pl. 1. 10

H. 6. 11. 33. F. N. B. 121, C.

(*t*) Anon. 6 Mod. 239.

IV.—*Feme covert.*

A feme covert is as competent to take a lease as a feme sole. The husband's express assent is not necessary, as the estate vests till dissent (*u*). But she may avoid it after his decease (*x*).

Where a feme covert is entitled to a renewal, she, or any person on her behalf, by direction of the court of Chancery in England, and of the courts of equity of the counties Palatine of Chester, Lancaster, and Durham, as to land within their respective jurisdiction (*y*), may surrender the subsisting lease for the purpose of obtaining it (*z*). This subject, however, will be found more fully noticed in another part of this work (*a*).

V.—*Aliens, Denizens, and Naturalized persons.*

Alien merchants, subjects of a friendly state, were always capable of acquiring and holding leases for years, but not freehold leases, of houses in this country for the purposes of habitation and traffic (*b*), their residence being regarded as an encouragement to trade and commerce. The crown, on office found, was entitled to their freeholds (*c*); and their leases, even for years, of lands, meadows, pastures, woods, and the like, were forfeitable in a similar manner (*d*); though, it seems, that the King might grant to the lessee a license to hold, and thus prevent the forfeiture (*e*).

(*u*) *Swaine v. Holman*, Hob. 204; 193. *Grosvenor v. Brook*, Poph. 36.
S. C. Hutt. 7. Co. Lit. 3, a. *Fourdrin v. Gowdey*, 3 Myl. & Keen,

(*x*) Co. Lit. 3, a. 383, 397-8.

(*y*) And, before their abolition by 11 Geo. 4, & 1 W. 4. c. 70. s. 14, of the courts of Great Session of the Principality of Wales.

(*z*) 11 Geo. 4, & 1 W. 4. c. 65. s. 12.

(*a*) Chapter on Renewals, post.

(*b*) *Calvin's case*, 7 Co. 17, a. Anon. 1 And. 25. pl. 56; S. C. Benl. 36. pl. 61. Bendl. 10. pl. 40. Co. Lit. 2, b. *Tirlot v. Morris*, or *Morrison*, 1 Bulstr. 134; S. C. *Tuerloote v. Morrison*, Yelv.

(*c*) Co. Lit. 2, b. Bac. Ab. 134. And see *Page's case*, 5 Co. 52, a.

(*d*) Ibid. 32 H. 6. 23. 1 Bac. Ab. 134. Co. Lit. 2, b. Dy. 2, b. marg. (3). 3 Salk. 29. *Calvin's case*, 7 Co. 17, a.

(*e*) 14 H. 4. 20. pl. 23. Co. Lit. 2, b. Hargr. n. (2). And see Anon. 1 Leon. 47. pl. 61; S. C., in almost the same words, 4 Leon. 82. pl. 175. *Golds.* 29. pl. 4. *Fourdrin v. Gowdey*, 3 Myl. & Keen, 383.

It is laid down by Lord Coke, that, unless the alien were a merchant, the crown would be entitled to his lease for years, though taken for habitation (*f*). Mr. Justice Blackstone, however, without drawing any distinction between alien merchants and other aliens, states, generally, that an alien may hire a house for habitation (*g*). Caroon's case (*h*), too, where administration of the property of an alien, an agent (*i*) here for the states of the Low Countries, consisting among other things, of leases for years, was committed to his brothers, who were also aliens, seems opposed to Lord Coke's doctrine. But in the late case of *Fourdrin v. Gowdey* (*k*), Sir John Leach, M.R., declared, that, with the single exception of a leasehold habitation for the purposes of trade, an alien could no more acquire any interest in leasehold, than in real estate properly so called.

All practical difficulty, however, on the point has been removed by a recent act of parliament (*l*), which provided (*m*), that every alien then residing in, or who should thereafter come to reside in, any part of the United Kingdom, and being the subject of a friendly state, may, by grant, lease, demise, assignment, bequest, representation, or otherwise, take and hold any lands, houses, or other tenements, for the purpose of residence, or of occupation, by him or her, or his or her servants, or for the purpose of any business, trade, or manufacture, for any term of years not exceeding twenty-one years, as fully, and with the same rights, remedies, exemptions, and privileges, except the right to vote at elections for members of parliament, as if he were a natural born subject of the United Kingdom.

An alien, whether a merchant or not, might before the act

(*f*) Co. Lit. 2, b. See 3 Salk. 29.
1 Rol. Ab. 194. pl. 7, Alien, (A).

(*g*) 1 Bla. Com. 372. And see Bendl.
10. pl. 40.

(*h*) Caroon's case, Cro. Car. 8.

(*i*) The conclusion in the text is
founded on the assumption that the

agent was a political, and not a commercial agent.

(*k*) *Fourdrin v. Gowdey*, 3 Myl. &
Keen, 383. 397.

(*l*) 7 & 8 Vict. c. 66. Royal assent,
6th August, 1844.

(*m*) Sect. 5.

take leases as an executor or administrator, because he would hold them in another's right (*n*).

By virtue of the act, he may also take, in right of his wife for residence, occupation, or business, a term not exceeding twenty-one years; but whether a term, generally, of which a woman is possessed, will, on her marriage with an alien, pass to her husband is not settled (*o*).

The same principle, the protection and advancement of our own commercial interests, that favored the residence of aliens as merchants in this country, prohibited, with a narrow policy, their occupation of dwelling houses or shops in the capacity of artificers: and it was enacted in the reign of King Henry the 8th (*p*), that all leases of any dwelling house or shop within this realm, or any of the King's dominions, made to any stranger artificer or handicraftsman, born out of the King's obeisance, not being denizen, should be void; a penalty of 100s. being also imposed alike on the person granting, and the artificer taking such lease.

The liberal construction of the statute in a measure defeated its design; for it might be evaded by his occupying a house or shop at will, or under an agreement which did not amount to a lease (*q*); though not by his being described as a gentleman, if in truth he were an alien artificer (*r*).

And it was decided (*s*), that the statute did not extend to an assignment of a lease to an alien; for, were it otherwise, the lessor, without any fault of his own, would lose his remedy against the assignee.

(*n*) Caroon's case, Cro. Car. 3. And see *Brooks v. Phillips*, Cro. Eliz. 683, in which case it appears that the administrator was an alien enemy. But see *Anon.*, semb. S. C., Ow. 45. Com. Dig. Alien, (C. 7). *Anon.* 1 And. 25. pl. 56; S. C. Benl. 36. pl. 61.

(*o*) *Theobalds v. Duffoy*, 9 Mod. 101-4.

(*p*) 32 Hen. 8. c. 16. s. 13.

(*q*) *Pilkington v. Peach*, 2 Show. 135. *Rex v. The Inhabitants of Eastbourne*, 4 East, 103-6. But see *Lapierre v. McIntosh*, 9 Adol. & Ell.

857; S. C. 1 Per. & Dav. 629.

(*r*) *Jevons v. Harridge*, 1 Sid. 309. A vintner was not within the act. "Such" said the Chief Justice, (the notorious Jeffries,) "as used any art or manual occupation were restrained from using it here to the prejudice of the King's subjects. Now, the mystery of a vintner chiefly consists in mingling of wines, and that is not properly an art, but a cheat." *Bridgham v. Frontee*, 3 Mod. 94.

(*s*) *Wootton v. Steffenoni*, 12 Mees. & Wel. 129.

The statute of Henry the 8th, is, therefore, in effect superseded by that of the present Queen. And as the latter does not take away or diminish any right, privilege, or capacity, theretofore lawfully possessed by, or belonging to, aliens residing in Great Britain or Ireland relating to the possession or enjoyment of any real or personal property, all such rights may be enjoyed as fully as before it was passed (*l*).

Alien enemies, among whom infidels are ranked, cannot hold leases either for the purpose of commerce or habitation (*u*).

But the disabilities to which aliens are still subject do not extend to denizens, who are as capable of taking and holding leases as natural born subjects (*x*).

And where an alien resident in England obtained letters of denization, which expressly enabled him to claim, retain, and enjoy, lands, tenements, and hereditaments, theretofore given, granted, or assigned, to him by the crown or any other person whatsoever, as fully as a liege subject born within the United Kingdom might, it was held that he was entitled to, and might bequeath, property held for a long term of years purchased by him previously to the grant of the letters (*y*).

Naturalized aliens may take leases as natural born subjects may do (*z*).

VI.—*Outlaws.*

Outlaws may be lessees (*a*); but their leases for chattel interests are forfeited to the Crown, whether the outlawry be incurred in a criminal or civil case (*b*); their freehold leases, however, are not forfeited on an outlawry in a civil action (*c*).

(*l*) Sect. 15.

(*u*) Co. Lit. 2, b. Calvin's case, 7 Co. 17, a. Wing. Max. 10. 1 Bla. Com. 372. Anon. Ow. 45. But see Brocks v. Phillips, (seml. S. C.) Cro. Eliz. 663.

(*x*) 1 Bla. Com. 374. Bendl. 10, pl. 40. 32 H. 3, c. 16, s. 13.

(*y*) Fourdrin v. Gowdey, 3 Myl. & Keen, 383.

(*z*) 7 & 8 Vict. c. 66, ss. 6 and 8.

(*a*) Knowles v. Powel, Mo. 237; S. C. Ow. 116. Shep. Touch. 235.

(*b*) 9 H. 6, 21. 1 Salk. 109. Reed v. Ward, or Warner, 1 Lev. 3; S. C. 1 Sid. 150; 1 Keb. 66. 548. Britton v. Cole, 1 Salk. 395. Rol. Ab. Utlagarie, (B), pl. 1. 2. Com. Dig. Utlagary, (D. 2.).

(*c*) 2 Rol. Ab. 307, 1. 30. Com. Dig. Utlagary, (D. 3.).

Unless the immediate reversion be in the Crown, in which case the lease becomes absolutely merged and extinguished (*d*), the reversal of the outlawry entitles the outlaw to have his term restored (*e*), though it may have been sold during the outlawry (*f*). And if the outlaw, pending the outlawry, assign his term to another, the assignee may, after the reversal, maintain an action for the profits accruing in the interval between the assignment and the reversal (*g*).

Leases which an outlaw takes as executor are not forfeitable on his outlawry (*h*).

VII.—*Attainted persons.*

Persons attainted of treason or felony may be lessees; but their leases are forfeitable to the Crown on office found (*i*).

VIII.—*Papists.*

The disabilities which formerly affected papists are now removed. By the statute of 11 & 12 Wm. 3. c. 4, it was enacted (*k*), that if any person educated in the popish religion, or professing the same, should not after six months after he or she should attain the age of eighteen years take the oaths of allegiance and supremacy, and also subscribe the declaration expressed in the act of 30 Car. 2 (*l*), being a declaration against transubstantiation, the invocation or adoration of the Virgin Mary, or any other saint, and the sacrifice of the mass, every person should, in respect of him or herself only, and not to or in respect of any of his or her heirs or posterity, be incapable of inheriting or taking by descent, devise, or limita-

(*d*) Knowles *v.* Powel, *sup.*

(*e*) Knowles *v.* Powel, *sup.* Eyre *v.* Woodfine, Cro. Eliz. 278; S. C. 1 And. 277. T. Jo. 101. Peyton *v.* Aybiffe, 2 Vern. 312. Com. Dig. Utlagary, (C. 5.). And see The President and Scholars of St. John's College, Oxford, *v.* Murecott, 7 Term Rep. 259, 264.

(*f*) Ibid.

(*g*) Ognell's case, Cro. Eliz. 270.

(*h*) Rol. Ab. Utlagarie, (B), pl. 1. Com. Dig. Utlagary, (D. 3.).

(*i*) Co. Lit. 2, b. Shep. Touch. 235.

(*k*) 11 & 12 W. 3. c. 4, s. 4.

(*l*) 30 Car. 2. stat. 2.

tion, in possession, reversion, or remainder, any lands, tenements, or hereditaments; and that, during the life of such person, or until he or she should take the said oaths, and subscribe the said declaration, the next of his or her kindred which should be a protestant should have and enjoy the said lands, &c., without being accountable for the profits during such enjoyment; and that every papist, or person making profession of the popish religion, should be disabled from purchasing, either in his or her own name, or in the name of any other person or persons, to his or her use, or in trust for him or her, any manors, lands, profits out of lands, tenements, rents, terms, or hereditaments; and that all estates, terms, and any other interests, or profits whatsoever out of lands, to be made, suffered, or done, to or for the use or behoof of any such person or persons, or upon any trust or confidence, mediately or immediately, to or for the benefit or relief of any such person or persons, should be utterly void and of none effect (*m*).

These provisions were repealed by the act of 18 Geo. 3. c. 60 (*n*), which provided at the same time (*o*), that nothing therein contained should extend to any person but such as should within six calendar months after the passing of the act, or of accruing of his, her, or their title, being of the age of twenty-one years, or, who, being under that age, should, within six months after attaining that age, or being of unsound mind, or in prison, or beyond the seas, then within six months after the removal of such disability, take and subscribe an oath of allegiance, abjuration, and supremacy.

By a late act (*p*), however, it is declared (*q*), that no oath or oaths shall be tendered to, or required to be taken by, his Majesty's subjects professing the Roman Catholic religion, for enabling them to hold or enjoy any real or personal property, other than such as may by law be tendered to, and required to be taken by, his Majesty's other subjects.

(*m*) *Denn dem. Warren v. Fearnside*, 1 Wils. 176; S. C. 3 Salk. 325.

(*n*) The entire act of 11 & 12 W. 3. c. 4, was repealed by 9 & 10 Vict. c. 59, s. 1.

(*o*) 18 Geo. 3. c. 60. s. 4.

(*p*) 10 Geo. 4. c. 7; unaffected by 9 & 10 Vict. c. 59.

(*q*) Sect. 22.

SECTION II.—WITH REFERENCE TO ESTATE.

The estate of a copyholder is the only one that requires particular comment in this section.

If a copyholder in fee take a common law lease of his copyhold either immediately from the lord of the manor (*r*), or by assignment from one to whom the lord has granted it (*s*); or if he take a lease of the manor itself (*t*), his copyhold interest will be extinguished for ever.

But if land be demised by copy of court roll to three sisters for their lives *successivé*, and the first tenant for life accept a common law lease by indenture from the lord, her interest only will be extinguished. The next sister in succession, however, cannot enter, for her remainder does not take effect until the death of the eldest sister; nor can the lord, as he is estopped by his deed (*u*).



SECTION III.—WITH REFERENCE TO NUMBER AND CONNECTION.

Leases may be granted as well to several persons as to one person; and where granted to several, they may take as joint-tenants, or as tenants in common.

I.—*Joint-tenants*.

If the lease be granted to two for a term of years, or for their lives, the survivor will be entitled to the whole at law (*v*),

(*r*) Lane's case, 2 Co. 16, b. 17, a.; S. C. 1 And. 191. pl. 226; 1 Leon. 170; S. C., nom. Smyth *v.* Lane, Gouldsb. 34. Anon. Godb. 101. pl. 117. Sav. 70, case 146. 1 Brownl. 32. Frenche's case, 4 Co. 31, a. Dugworth *v.* Radford, W. Jo. 462. And see Blemmer Hassett *v.* Humberstone, Hutt. 65; S. C., nom. Blevherhasset *v.* Humberstone, W. Jo. 48.

(*s*) Lane's case, sup.

(*t*) Lane's case, sup. Frenche's case, 4 Co. 31, b. 2 Sid. 139. Sav. 70-1. Belfield *v.* Adams, 3 Bulstr. 81; S. C., nom. Southcott *v.* Adams, 1 Rol. 256. Anon. Cro. Eliz. 7. Gybson *v.* Searls, Cro. Jac. 84, *arg.* by Coke, cont.; and cont. Co. Cop. 172.

(*u*) Curtise *v.* Cottel, 2 Leon. 72.

(*v*) Lit. s. 281. Co. Lit. 181, b. 182, a. Sym's case, Cro. Eliz. 33. Bruduel's case, 5 Co. 9, a.

unless the joint estate be previously severed (*x*). And this benefit of survivorship accrues notwithstanding the death of one of the lessees before entry (*y*). But if the lease be taken by partners as part of their partnership property (*z*), or upon a joint speculation, with a view to drainage, for instance (*a*); or if the purchase money be paid in unequal shares (*b*); the surviving lessee will, in equity, be deemed a trustee of the share of the deceased co-tenant, and accountable to his representatives accordingly.

In other cases, the rule of survivorship obtains in equity as well as at law (*c*).

Until a very recent period, if the lease were made by indenture *inter partes*, none but those who were parties to the deed could take as joint-tenants. Thus, if a lease were made between A. and B., habendum to B., C., and D., for their lives, and the life of the longest liver of them, in succession, they could not take as joint-tenants, C. and D. not being parties to the deed (*d*). But the late act to amend the law of real property (*e*) has enacted (*f*), that under an indenture executed after the 1st of October, 1845, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture.

On the grant of a lease to two or more for years, or for their lives, the estate survives, without express words of limitation, to the survivor (*g*). So, if a lease be made to A. during the

(*x*) Lit. s. 301. Co. Lit. 191, a.

(*y*) Co. Lit. 46, b.

(*z*) *Crawslay v. Maule*, 1 Swanst. 508, 521. *Elliott v. Brown*, 3 Swanst. 439, n.; cited by Lord Eldon, 9 Ves. 597.

(*a*) *Lake v. Craddock*, 3 P. Wms. 153; *S. C.*, nom. *Lake v. Gibson*, 1 Eq. Ca. Ab. 291, pl. 3.

(*b*) *Lake v. Gibson*, sup. *Aveling v. Knipe*, 19 Ves. 441.

(*c*) *Rex v. Williams*, Bumb. 342. *Jeffereys v. Small*, 1 Vern. 217; *S. C.*

1 Eq. Ca. Ab. 370, pl. 1. *Aveling v. Knipe*, sup. *Usher v. Ayleward*, 1 Vern. 360.

(*d*) *Greenwood v. Tyber*, or *Tyler*, Cro. Jac. 563-4, 3rd point; *S. C. Hob.* 314; *Palm. 29*. *Windsore v. Hobart*, or *Hubbard*, Hob. 313; *S. C. Cro. Eliz.* 57; *Hutt.* 87.

(*e*) 8 & 9 Viet. c. 106.

(*f*) Sect. 5.

(*g*) See post, as to leases for lives. Lit. ss. 231, 301. Co. Lit. 181, b. 191, a. *Brudnell's case*, 5 Co. 9, a.; 1 Mod. 187.

lives of B. and C., without saying, “and during the life of the survivor,” if one of the *cestuis que vie* die, the estate is not determined, but remains in A. for the life of the surviving *cestui que vie*; for A. had an estate of freehold by way of limitation of an estate during the lives of two men, and by construction of law during the life of the survivor of them (*h*). And this difference is observable between a limitation (as in the case just put) of an estate of freehold during lives, which is the usual and ordinary limitation of a freehold, and a collateral determination, as during the time that C. and D. shall be of the Inner Temple, or shall be dwelling in Norfolk, or be Justices of the Peace, or the like; for in these cases the failure of the one will determine the estate. And, on the same principle, if a lease be made to two or more for a term of years if they shall so long live, the death of one will determine the estate (*i*); and, therefore, express words of survivorship, such as, “if A. and B., or either of them, shall so long live,” are necessary to continue the estate to the survivor (*j*). And, hence, to determine a lease on the death of one of several lessees for lives, the limitation should be to them for their joint lives (*k*).

If a lease be granted to A. and B. during the life of A., and B. die, A. takes the whole by survivorship; but if A. die first, the lease is determined (*l*).

If a lease for years be made to two jointly and severally, the words “and severally” are void, and the parties will hold as joint-tenants (*m*).

It is to be observed, that if a lease for years be made to a bishop or parson and a layman, they will hold as joint-tenants, as it is a general rule, that no chattel can go in succession in the case of a corporation sole (*n*).

(*h*) Brudnell's case, *sup*.

(*i*) *Ibid*.

(*j*) *Ibid*.

(*k*) See as to leases for lives *post*, Part the Fourth, Ch. VI.

(*l*) Co. Lit. 131, b. Dy. 10, b.

(*m*) Slingsby's case, 5 Co. 19, a.; Jenk. Cent. 262; Latch, 264.

(*n*) Co. Lit. 46, b. 190, a. See also *post*, p. 542, as to leases to Corporations.

II.—*Tenants in common.*

To constitute a tenancy in common at law among lessees, express words of severance are necessary; as, to hold to them, their executors, &c., as tenants in common (*o*).

III.—*Husband and Wife.*

Husband and wife also may take together as joint lessees (*p*); and an action of debt for rent may be maintained against them jointly (*q*). The wife cannot renounce the lease during coverture (*r*). The husband alone by deed, but not by will, may dispose of a chattel interest to the exclusion of the wife surviving (*s*). And if he grant an underlease of lands let to him and his wife, he may maintain an action on the case for an injury to his reversionary interest without joining his wife as co-plaintiff (*t*). If the wife survive, the term not having been disposed of by her husband in his lifetime, she will be entitled to it in her own right (*u*); and, by continuing in possession, will be liable to the payment of rent, and performance of conditions (*x*); but not to an action of covenant (*y*). By renouncing the lease on her husband's death, which she is competent to do, notwithstanding his previous assent, she may absolve herself personally from the lessor's claims (*z*). In an early case (*a*), where a lease was made to B. and his

(*o*) 2 Bla. Com. 193.

(*p*) Rol. Ab. Baron & Feme, (Z), pl. 2. (C), pl. 1.

(*q*) Bro. Ab. Dette, pl. 217.

(*r*) Bro. Ab. Agreement, pl. 6. Dette, pl. 217.

(*s*) Rol. Ab. Baron & Feme, (F), pl. 1. 2. (G), pl. 4. Co. Lit. 351, a.

(*t*) Wallis v. Harrison, 5 Mees. & Wel. 142; S. C. 7 Dowl. Prac. Ca. 395; 2 Horn & Hurl. 65.

(*u*) Butler v. Swinerton, Cro. Jac. 657; S. C. Palm. 339; 2 Rol. 286. And

see Dembyu v. Brown, Mo. 887; S. C. nom. Browne v. Dunnery, Hob. 208. Anon. Cro. Eliz. 61. Temple v. Temple, Cro. Eliz. 791.

(*x*) Kirton v. Elliott, 2 Bulstr. 69. Anon. Brownl. & Gold. 31. Rol. Ab. Baron & Feme, (Z), pl. 2.

(*y*) Anon. Brownl. & Gold. 31.

(*z*) Kirton v. Elliott, 2 Bulstr. 69. Co. Lit. 3, a.

(*a*) Cox's case, Jenk. Cent. 279, case 1.

wife for years, if B. *and* his wife *or* their son should so long live, and B. and his son died, the court held that the wife was entitled by survivorship; for the word *or* amounted to a disjunctive, it being immaterial whether it was placed first, last, or in the middle of the sentence, and rendered the construction the same as if the limitation had been to B., and his wife, if he, or his wife, or their son, should live so long.

SECTION IV.—WITH REFERENCE TO OFFICE.

1.—*Corporations in general.*

Corporations aggregate or sole may take lands or other hereditaments by way of lease, provided they do not contravene the provisions of the statutes of mortmain (*b*). What term may be granted without incurring the penalty of forfeiture is not clearly settled. In the reign of Edward the Fourth, it was argued by Nele (*c*), that where a small term was recovered or given to a man of religion, as twenty or forty years, it was not contrary to the statute *De Religiosis*, though it was otherwise of a term of 100 or 200 years, on account of its long continuance (*d*); but the point was not judicially noticed. Brooke, in his Abridgment (*e*), has a query, whether a lease for 100 years would amount to mortmain; but he says, it seems not, for it is a usual time; but 99 years (*f*) would not, for they are very usual. He makes no doubt that a lease to a religious person for 400 years, or for 100 years, and so from a hundred years to a hundred years until 800 years should have elapsed, would be within the

(*b*) 7 E. 1. Stat. 2. c. 1, called the statute *De Religiosis*. 15 R. 2. c. 5.

(*c*) He was not elevated to the bench till about twenty years afterwards.

(*d*) 3 E. 4. p. 13. pl. 8. Bro. Ab. Mortmaine, pl. 27.

(*e*) Bro. Ab. Mortmaine, pl. 39. In

Viner's Abridgment, Mortmain, (B) pl. 21, and marginal note, the case does not appear to be correctly stated.

(*f*) Printed in the Abridgment *iii. xix. xix*; and signifying 99, that is, four twenties and nineteen. And see 4 H. 6. 9. [B], 1. 2 Rol. 170.

statute *De Religiosis* (*g*); but he says, that if a man make a lease for 100 years, or the like, and covenant that he or his heirs, at the end of the 100 years, will make another lease for another hundred years, and so on, this is not mortmain, because it is but a lease for 100 years, and the rest is but a covenant (*h*).

In a recent case (*i*), it was admitted that a lease of tithes to the principal, fellows, and scholars of Jesus College, in the University of Oxford, for twenty-one years, was not within the statute of mortmain.

A lease cannot be made to a corporation otherwise than by deed (*k*).

If the corporation be aggregate, the interest, though for a term of years, will go to their successors (*l*); but a lease for years granted to a bishop will, on his death, devolve on his executors *in autre droit* (*m*). So, if a lease be granted to a bishop or a parson and a layman, they will be joint tenants, the bishop or parson taking in his individual, and not his corporate capacity (*n*). By custom, however, as in the case of the Chamberlain of the City of London, a chattel term may go in succession (*o*),

A lease to a corporation aggregate for the life of the lessor, confers a good estate for life, as the life of the lessor, which is wearing and will determine, is the measure of its continuance; but a lease to a corporation aggregate for their own lives, being equal to a grant made to them while they continue a body politic, that is, in contemplation of law, for ever, by reason of the perpetual succession of its members, confers not an estate for life, but a fee-simple (*p*).

Although, in general, corporations may dispose of their

(*g*) Bro. Ab. Mortmain, pl. 39.

(*h*) Ibid. Vin. Ab. Mortmain, (B), pl. 72. And see ante, p. 113.

(*i*) Jesus College v. Gibbs, 1 Y. & Col. Exch. 145.

(*k*) Predyman v. Wodry, Cro. Jac. 169.

(*l*) Bac. Ab. Corporations, (E), 4.

(*m*) Co. Lit. 46, b. Bac. Ab. Corporations, (E), 4.

(*n*) Co. Lit. 190, a.

(*o*) Bac. Ab. Corporations, (E), 4. n. (c), 7th ed. Fulwood's case, 4 Co. 64, b. 65, a.

(*p*) Bac. Ab. Corporation, (E), 1. Rol. Ab. Estate, (K).

lands to any individual member, the capacity of a corporation, and its constituent members, as individuals, being distinct (*g*); yet a dean cannot take a lease from the chapter, nor one of the chapter from the dean and the rest of the chapter; as the dean and chapter must all concur in granting a valid lease (*r*); though it was determined by the same case (*s*), that any of the prebendaries (*t*) might take a lease from the dean and chapter, the prebendaries not being an integral part of the corporation.

In like manner, if a corporation aggregate consist of two bailiffs and burgesses, one of the bailiffs and the burgesses in their corporate capacity cannot make an effectual lease to the other bailiff in his natural capacity; the bailiffs constituting but one officer, and neither being competent to act without the other (*u*).

Nor can a corporation sole, as a bishop or a parson, in his corporate capacity, make a lease to himself in his individual capacity (*x*).

II.—*The Crown, and its Officers.*

However incompatible it may appear with the principles of tenure, or the dignity of the crown, that the King or Queen should hold of a subject, yet from several cases we learn that the Monarch may be a lessee for life or years (*y*), though not at will (*z*).

(*g*) 1 Kyd on Corp. 180.

(*r*) *Salter v. Grosvenor*, 8 Mod. 303.

(*s*) Ibid.

(*t*) All the members of chapter, except the dean, in every cathedral and collegiate church in England, and in the cathedral churches of St. David and Llandaff, are now styled "Canons." See 3 & 4 Viet. c. 113. s. 1.

(*u*) *Salter v. Grosvenor*, sup. By a late act, 5 & 6 W. 4. c. 76, to provide for the regulation of municipal corporations in England and Wales, the municipal corporations named in sche-

dules (A) and (B) thereto are to be uniformly styled "The mayor, aldermen, and burgesses, of the borough of ——" Sect. 6.

(*x*) *Salter v. Grosvenor*, sup.

(*y*) *Warren v. Smith*, Cro. Jac. 364; S. C. 11 Co. 66. 77. *Lepur v. Wroth*, 1 Leon. 35. *Stillington v. Parker*, 6 Mod. 248. *Rol. Ab. Confirmation*, (H), pl. 7. *Latch*, 240. *Palm*, 466. And see note (c) to 1 *Scriv. Cop.* 132, 3rd ed.

(*z*) *Stillington v. Parker*, sup.

Leases, however, intended to be granted for the benefit of the crown are now taken in the names of commissioners or trustees appointed under the statutes of 10 Geo. 4. c. 50, and 2 & 3 Wm. 4. c. 1, whereby the commissioners of her Majesty's woods, forests, land revenues, works, and buildings (*a*), are empowered to take on behalf of her Majesty, her heirs or successors, of any person or persons, or body or bodies politic, or corporate, or collegiate, any lease of any manors, messuages, lands, tenements, or hereditaments, for such period, at such rent, and with or without any fine, and subject to such covenants, conditions, and provisions, and on such terms, and to enter into such contracts for that purpose, as to the commissioners shall seem proper (*b*).

They are also empowered (*c*) to purchase of any person, &c., any lease or term of years, which may be then subsisting in any manors, &c., whether the same shall or shall not be a part or parts of the possessions and land revenues of the crown to which the act relates (*d*), and to enter into such contracts for that purpose as to them shall seem proper.

In every case where any lease shall be taken by them, and in every case where any lease, not being a lease of part of the possessions and land revenues of the crown to which the act relates, shall be purchased or taken in exchange, they must cause such lease to be granted or assigned, as the case may be, to a trustee or trustees for her Majesty, her heirs and successors; and they are directed to indemnify such trustees respectively, and their heirs, &c., from the rents and cove-

(*a*) All acts required, directed, or permitted to be done by the commissioners, may be done by any two of them: 10 Geo. 4. c. 50. s. 16. 2 & 3 W. 4. c. 1. s. 10. See ante, p. 133.

(*b*) 10 Geo. 4. c. 50. s. 47.

(*c*) 10 Geo. 4. c. 50. s. 48.

(*d*) The possessions and land revenues of the crown to which the act relates comprise all honours, hundreds, castles, lordships, manors, forests, chases, woods, parks, messuages, lands, tithes, fisheries, franchises, services,

rents, and other land revenues, possessions, tenements, and hereditaments whatsoever, (advowsons of churches and vicarages only excepted,) which belong or hereafter shall belong to her Majesty, her heirs or successors, within the ordering and survey of the court of Exchequer in England or Wales, in Ireland, in the Isle of Man and its dependencies, and the Isle of Alderney, whether in possession, remainder, or reversion. See sect. 8 of the act.

nants in such leases respectively reserved and contained, and on the part of the lessees to be paid observed and performed (*e*).

And in every case in which any subsisting lease of any part of the possessions and land revenues of the crown to which the act relates shall be purchased or taken in exchange by the commissioners, or shall have been contracted for under any of the acts thereby repealed, they may either cause the same to be surrendered, in order that they may merge, or cause them to be assigned to any trustee or trustees for her Majesty, her heirs or successors, to be kept on foot distinct from the inheritance (*f*).

And it is provided (*g*), that no purchase, except where the money shall not exceed 100*l*., shall be made by the commissioners without the previous authority of the lord high treasurer or the commissioners of the treasury for the time being (*h*), to be signified by some warrant under hand. Such authority, however, may be given either generally for any particular class of cases, or for any particular purchase, and either with or without any condition or restriction, as to the lord high treasurer or commissioners may seem meet.

For the purpose of carrying such purchases into effect, the act empowers all bodies politic or corporate, ecclesiastical or civil, and all trustees for the time being, possessed of or entitled to any leases or terms of years, or any manors, lordships, &c., which the commissioners shall be desirous of purchasing, and for all tenants for any interest short of an absolute interest therein, and for the guardians or guardian, or committees or committee, of any person interested therein who shall be an infant, lunatic, idiot, or otherwise incapacitated, to contract with the commissioners for the absolute sale of such leases, terms, manors, &c., and to assign, convey, or surrender the same accordingly (*i*).

(*e*) 10 Geo. 4, c. 50. s. 49.

(*f*) Sect. 50.

(*g*) Sect. 60.

(*h*) All acts required, directed, or permitted to be done by the Commis-

sioners of the Treasury, may be done by any three of them. 10 Geo. 4. c. 50. s. 16. See ante, p. 188-9.

(*i*) Sect. 53.

Where any purchase shall be made from any body politic, corporate, or collegiate, or person under incapacity, or not having power to sell except under this provision, the value of the property purchased shall be ascertained by two able practical surveyors, one to be nominated by the commissioners, and the other by the body politic or corporate, or person, contracting to sell; and if such two surveyors shall not agree in their valuation, then by such third surveyor as the two shall nominate; and each of the two, if they shall agree in and make their valuation, or if not, the surveyor so to be nominated by them, are to verify the survey and valuation on oath, or (being one of the people called Quakers,) on affirmation, to be subscribed by him, and taken before and certified by any justice of the peace or magistrate in a form provided by the act (*k*); and the price or consideration to be paid or given for such purchase shall in no case be less than the sum at which the same shall be valued in such survey (*l*).

And in all other cases, before the making of any purchase, a like survey and estimate of the hereditaments proposed to be purchased shall be taken as is required in cases of grants of leases by the commissioners (*m*), unless from the circumstances before mentioned (*n*), such survey shall be deemed inexpedient (*o*).

All deeds or instruments by which any estates, &c., in England or Wales shall be purchased under the act, are subject to the same regulations with regard to enrolment, and proof of enrolment, as are applicable to leases granted by the commissioners (*p*).

And the 66th section of 10 Geo. 4, and the 25th & 28th sections of 2 & 3 W. 4, declare (*q*), that every conveyance, deed, or instrument, whereby any term of years in hereditaments in England or Wales shall be assigned to her Majesty, her heirs or successors, or to a trustee or trustees for her

(*k*) 10 Geo. 4, c. 50, s. 61.

(*l*) Sect. 54.

(*m*) See ante, p. 189.

(*n*) See ante, p. 189.

(*o*) Sections 61 and 62.

(*p*) 10 Geo. 4, c. 50, s. 63. 2 & 3 W. 4, c. 1, ss. 13, 15, 21, 22. And see ante, p. 196-7.

(*q*) 10 Geo. 4, c. 50, s. 66; 2 & 3 W. 4, c. 1, ss. 25 & 28.

Majesty, her heirs or successors, shall, when so enrolled, without any enrolment or acknowledgment in any court of law or equity, or any registry thereof, be as good as if the same had been enrolled in any of her Majesty's courts at Westminster, or as if a memorial had been entered or registered in the office appointed for registering of deeds and other conveyances in the county or counties in which the same estates or any of them are situate.

If the premises purchased lie in Ireland, the commissioners must cause duplicates of all conveyances, deeds, or instruments, by which they are purchased or taken in exchange to be transmitted to the office of record in Ireland in which the original rentals or rent rolls of the Queen's rents shall be preserved; and every such duplicate must be there preserved, and be and remain of record among the other records and muniments preserved in such office (*r*).

And every such conveyance, deed, or instrument of premises in Ireland, without any enrolment in any court of law or equity, or any registry thereof, is declared to be as good as if the same had been enrolled in any of her Majesty's courts at Dublin, or as if a memorial had been entered or registered in the office appointed for registering deeds and other conveyances of lands and tenements in Ireland under an act passed in the parliament of Ireland in the reign of Queen Anne (*s*).

No memorandum, contract, or agreement, to be made or entered into by or with the commissioners for the purchase or exchange of any estates, &c., or any term or interest therein, by the commissioners, nor any deed, receipt, or other instrument, given, granted, entered into, executed, or made, for the purpose of carrying into effect any such purchase or exchange, or which shall be incidental to, or connected with, any such purchase or exchange, nor any lease, or contract for any lease or leases, nor any counterpart of any lease to be entered into, made, executed, or granted, under the powers of the act, shall be subject or liable to any ad valorem or

(*r*) Sect. 70.(*s*) Sect. 72.

other stamp duty whatsoever under any present or future act, unless the same be specially subjected thereto by such future act (*t*).

The 17th section of the act exempts the commissioners from all personal responsibility in respect of leases or purchases taken on behalf of the crown (*u*).

The annual report which the commissioners are directed to make (*x*) is to include such leases and purchases as they shall have taken and made on behalf of her Majesty during the preceding year.

We have already (*y*) had occasion to advert to the union, by 2 W. 4. c. 1, of the office of the surveyor-general of her Majesty's works and public buildings to the office of the commissioners of the woods, forests, and land revenues; the commissioners being called, "The Commissioners of her Majesty's woods, forests, land revenues, works, and buildings"; and we have also seen (*z*), that, by the statute of 2 & 3 W. 4. c. 112, the hereditary land revenues of the Crown in Scotland were placed under the management of the same commissioners. The powers conferred by this act were enlarged in the next session of parliament, by investing the commissioners with the same powers with regard to lands in Scotland, as they enjoyed with regard to lands in England (*a*), and, consequently, of taking leases of lands in Scotland, on behalf of the Crown, according to the 47th and other sections of the act of George the 4th (*b*); though, instead of the enrolment there prescribed, the commissioners are to cause duplicates of all such leases to be recorded or registered in the office of Chancery of Scotland, and a minute or docket of such leases to be entered and preserved in their own office (*c*).

It is further provided (*d*), that every conveyance, deed, or

(*t*) Sect. 77.

(*u*) 10 Geo. 4. c. 50. s. 17. And see ante, p. 199.

(*x*) 10 Geo. 4. c. 50. s. 125. Ante, p. 200-1.

(*y*) Ante, p. 187-8.

(*z*) Ante, p. 204.

(*a*) 3 & 4 W. 4. c. 69; amended by

5 & 6 W. 4. c. 53. And see ante, p. 206.

(*b*) 10 Geo. 4. c. 50. s. 47; and see ante, p. 544.

(*c*) 3 & 4 W. 4. c. 69. s. 7. And see also sect. 8; and ante, p. 207.

(*d*) Sect. 9.

other document, whereby any lands or other heritable property or subjects to which the act relates, or any term of years or interest therein, shall be conveyed or leased to her Majesty, her heirs or successors, or to a trustee or trustees for her Majesty, her heirs or successors, under the authority of the act, shall, without any other enrolment or registration thereof than in the office of chancery in Scotland, be of the like force in favor of her Majesty, her heirs and successors, as if the same had been or was enrolled or registered in the books of council and session, or in the general or special register of sasines in the county, shire, or stewartry, within which the lands or other heritable property or subjects shall be situate.

Provided (*e*), that a note or memorandum of every such conveyance, deed, or other document, setting forth the date thereof, the names of the disponent or granter, and disponent or grantee, and the leading names of the lands or heritages, and of the county or counties wherein the same are situated, shall, within fourteen days after the execution thereof, or as soon thereafter as possible, be entered by the grantee in the minute book of the register of sasines at Edinburgh, of the date on which such note or memorandum is presented, and also upon the margin of the entry in the register of sasines, general or particular, of the last instrument of sasine in the property of the lands or heritages alienated, recorded in such register; and that such entries shall be so made without fee or reward payable therefor.

III.—*Ecclesiastical bodies.*

By an act passed in the reign of Henry the Eighth (*f*), all spiritual persons, secular and regular, and of what degree soever, were prohibited from taking to farm any manors, lands, tenements, or other hereditaments, for term of life, for term of years, or at will, under a penalty of 10*l.* for every

(*e*) Sect. 10.

(*f*) 21 Hen. 8. c. 13.

month of their occupation. And though in the reign of George the Third the severity of this prohibition was relaxed by an act (*g*), which empowered spiritual persons not having sufficient or convenient glebe in right of their benefices to take to farm, for a limited term of years, lands, tenements, or hereditaments, with the consent of the bishop of the diocese, without being liable to the penalties of the act of Henry the 8th, it was afterwards thought advisable to restrain all spiritual persons having or holding any dignity, prebend, canonry, benefice, or any stipendiary curacy or lectureship, from taking to farm for occupation more than eighty acres without the consent of the bishop of the diocese (*h*) ; a restraint continued by a late act of parliament (*i*), which provides (*k*), that it shall not be lawful for any spiritual person holding any cathedral preferment or benefice, or any curacy or lectureship, or who shall be licensed or otherwise allowed to perform the duties of any ecclesiastical office whatever, to take to farm, for occupation by himself, by lease, grant, words, or otherwise, for term of life, or of years, or at will, any lands exceeding eighty acres in the whole, for the purpose of occupying or using or cultivating the same, without the permission in writing of the bishop of the diocese specially given for that purpose under his hand ; and that every such permission to any spiritual person to take to farm for the purpose aforesaid any greater quantity of land than eighty acres shall specify the number of years, not exceeding seven, for which such permission is given ; and that every such spiritual person who shall without such permission so take to farm any greater quantity of land than eighty acres shall forfeit for every acre of land above eighty acres so taken to farm the sum of forty shillings for each year during or in which he shall so occupy, use, or cultivate, such land contrary to the provision therein aforesaid.

(*g*) 43 Geo. 3. c. 84. s. 4, amended by 43 Geo. 3. c. 109.

(*h*) 57 Geo. 3. c. 99, repealing 21 Hen. 8. c. 13, and 43 Geo. 3. cc. 84 and 109.

(*i*) 1 & 2 Vict. c. 106, which repeals 21 Hen. 8. c. 13; and 57 Geo. 3. c. 99, except so far as the latter act repealed any other.

(*k*) Sect. 28.

The term *benefice*, as used in this act, signifies benefice with cure of souls, and no other, and comprehends all parishes, perpetual curacies, donatives, endowed public chapels, parochial chapelries, and chapelries or districts belonging, or reputed to belong, or annexed, or reputed to be annexed, to any church or chapel (*l*).

It has been held, that a lease to a spiritual person, contrary to 21 Hen. 8. c. 13, was not void (*m*); though a court of equity would not lend its aid to enforce a specific performance of a contract for such a lease (*n*). From the similarity of the language in the two acts, it is submitted that the cases cited are applicable to the act of 1 & 2 Vict. c. 106.

The act of Henry the 8th extended to manors, lauds, tenements, or other hereditaments; but the act of her Majesty is confined to lands; and, hence, there is no restriction against ecclesiastical persons taking a lease of tithes.

IV.—*Churchwardens and Overseers, and others connected with the Management of the Poor.*

Leases of this description are for all practical purposes regulated by act of parliament.

By 9 Geo. 1. c. 7 (*o*), churchwardens and overseers of the poor in any parish, town, township, or place, were empowered (*p*), with the consent of the major part of the parishioners or inhabitants, assembled in manner therein mentioned, to purchase or hire any house in the same parish, township, or place, and to keep, maintain, and employ, the poor there.

And by 59 Geo. 3. c. 12 (*q*), the churchwardens and over-

(*l*) Sect. 124. The theory of our ecclesiastical constitution knows not the character of a clergyman unemployed. He must either be beneficed, or a curate with a stipend; per Lord Eldon, C., in *Morris v. Preston*, 7 Ves. 554.

(*m*) *Woodley v. James*, 3 Dy. 356, a. *Hitchcock v. Thurland*, 3 Leon. 122. But see *Morris v. Preston*, 7 Ves. 546.

(*n*) *Morris v. Preston*, sup.

(*o*) 9 Geo. 1. c. 7, entitled "An act for amending the laws relating to the settlement, employment, and relief of the poor."

(*p*) Sect. 4.

(*q*) 59 Geo. 3. c. 12, entitled "An act to amend the laws for the relief of the poor."

seers in any parish not having a workhouse for the poor thereof, or an insufficient or inconvenient workhouse, were empowered (*r*), by the direction of the inhabitants in vestry assembled, to build in the parish a suitable workhouse, and to purchase, or take on lease, any ground within the parish for the purpose of such building; or (*s*), by the direction of the inhabitants so assembled, to purchase or hire any suitable and convenient house or building for the purpose, in any adjoining parish, with the consent of two or more justices; so that such house or building should not be situate more than three miles from the parish for which the same should be purchased or hired.

They were also empowered (*t*), with the consent of the inhabitants of the parish in vestry assembled, to hire and take on lease, for and on account of the parish, any suitable portion or portions of land within or near to the parish, not exceeding twenty acres in the whole; and to employ the poor in the cultivation thereof on account of the parish.

And it was provided (*u*), that all buildings, lands, and hereditaments, which should be purchased, hired, or taken on lease, by the churchwardens and overseers of the poor of any parish, by the authority and for any of the purposes of the act, should be conveyed, demised, and assured, to the churchwardens and overseers of the poor of every such parish respectively, and their successors, in trust for the parish; and such churchwardens and overseers of the poor and their successors were thereby empowered to accept, take, and hold, in the nature of a body corporate, for and on behalf of the parish, all such buildings, lands, and hereditaments, and also all other buildings, lands, and hereditaments, belonging to such parish (*x*).

And the provisions of an act of 22 Geo. 3 (*y*), more particularly noticed hereafter (*z*), for enabling bodies politic, cor-

(*r*) Sect. 8.

(*s*) Sect. 10.

(*t*) Sect. 12.

(*u*) Sect. 17.

(*x*) Some remarks on the construc-

tion of this clause will be found, ante, p. 321.

(*y*) 22 Geo. 3. c. 83.

(*z*) Post, p. 554, where the provisions are fully set out.

porate, trustees, guardians, and incapacitated persons, to contract for the sale of, and to convey and lease, lands, &c., for the purposes in that act expressed, were extended (*a*) to lands, &c., to be purchased hired or taken, for the purposes and under the authority of the act of 59 Geo. 3.

The twenty acres so allowed to be taken were extended to fifty by 1 & 2 W. 4. c. 42 (*b*).

It is to be observed, that churchwardens and overseers are not, by virtue of the act of 59 Geo. 3. c. 12, a proper body corporate, with all the legal incidents and restrictions belonging to such a body by the common law; and, therefore, a demise to them is sufficient to vest property in them on behalf of the parish by their assent and entry, without any acceptance by them by an instrument under the common seal of the supposed corporation, as is necessary in the case of a proper corporation according to the rules of the common law (*c*).

It is also observable, that this statute (59 Geo. 3. c. 12,) applies to those cases only where the rents are applicable solely to parochial purposes which are under the control of the parish officers. And, therefore, if the churchwardens and overseers take a lease of land jointly with other persons, as, with the surveyors of the highways, the terms of the statute are not complied with, as the land cannot be managed by them exclusively for the use of the poor, when other persons have the legal estate jointly with them, and might apply part of the land to other purposes. The lessees would, therefore, be personally liable for rent; the statute, under such circumstances, not transferring that liability to their successors in office (*d*).

But it is competent for any one churchwarden or overseer under the act to make or order a distress to be made without

(*a*) Sect. 18.

(*b*) 1 & 2 W. 4. c. 42, entitled "An act to amend an act of the 59th year of his majesty King George the 3rd for the relief and employment of the poor."

(*c*) *Smith v. Adkins*, 3 Mees. & Wel. 362; S. C. 1 Dowl. Prac. Ca. N. S. 129.

(*d*) *Uthwatt v. Elkins*, 13 Mees. & Wel. 772.

calling a meeting of all, and having the authority of the majority of those present (*e*).

By 22 Geo. 3. c. 83 (*f*), which authorised the union or incorporation of parishes and townships for the better relief and employment of the poor, every guardian of the poor appointed in the manner thereby prescribed (*g*), was invested (*h*) with the powers and authorities given to overseers of the poor by any other act of parliament, and was declared to be to all intents and purposes, except with regard to the making and collecting of rates, an overseer of the poor for the parish or township for which he should be so appointed guardian. And the guardians of the poor of the several parishes, townships, and places, adopting the provisions of the act were directed (*h*) to provide a suitable and convenient house, with proper buildings and accommodations thereto, when wanted, either by erecting new ones on land to be purchased or rented by them for that purpose, altering old ones, or hiring buildings for the purpose; and to fit up and dispose of the same with the advice and approbation of the visitor, if any, to be appointed in manner thereby prescribed (*i*), in such manner as should be most conducive to the general purposes of the act; but it was declared (*j*), that no agreement for renting a house should be for a longer term than twenty-one years, unless the guardian or guardians should have an option of vacating it at the end of that term on giving twelve months' notice in writing of his or their intention so to do; nor for a shorter term than three years; the rents to be paid out of the poor rates.

It was also provided (*k*), that the visitor and guardian for the time being of every parish, township, and place, or of the several parishes, townships, and places, after having adopted

(*e*) *Gouldsworth v. Knights*, 11 Mees. & Wcl. 337.

(*f*) 22 Geo. 3. c. 83, entitled "An act for the better relief and employment of the poor", amended by 1 & 2 Geo. 4. c. 56.

(*g*) Sections 3 and 7. And see 11

Geo. 3. c. 9; and 4 & 5 W. 4. c. 76. ss. 37 and 41.

(*h*) Sect. 17.

(*i*) Sect. 10. And see 1 & 5 W. 4. c. 76. ss. 37 and 41.

(*j*) Sect. 19. and sched. No. 4.

(*k*) Sect. 21.

the provisions of the act, should be one body politic and corporate, and might accept take and hold, by purchase or lease, any lands, tenements, or hereditaments, of inheritance, or for lives, or years, or for years determinable on the death of any life or lives, not exceeding in any city or town one acre, and not exceeding in the open country twenty acres, of statute measure, for the site of a house or houses to be built, and for lands to be occupied for the purposes of the act.

And all bodies politic, corporate, or collegiate, corporations aggregate or sole, husbands, guardians, trustees, feoffees in trust, committees, executors, administrators, and all other trustees whatsoever, not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of their cestuis que trust, whether infants, issue unborn, lunatics, idiots, femmes covert, or other person or persons, and all femmes covert who were or should be seised, possessed of, or interested in, any lands, tenements, or hereditaments, which should be necessary to be purchased or rented for the purposes of the act, were empowered (*l*) to contract for, sell, and convey, or lease the same, or any part thereof, in manner therein aforesaid, not exceeding the quantity therein aforesaid, unto the said visitor and guardians, their successors and assigns, or to such person or persons as they should nominate and appoint, for the use and benefit of such poor house, and the poor persons within such parishes, townships, and places, respectively, and for all other the purposes of the act.

The twenty acres were afterwards (*m*) extended to fifty.

By an act of 4 & 5 Wm. 4 (*n*), the administration of relief to the poor throughout England and Wales, according to the then existing laws, or such laws as should be in force at the time being, was subjected to the direction and control of the poor law commissioners for England and Wales (*o*).

(*l*) Sect. 22.

(*m*) 1 & 2 W. 4. c. 42. ss. 1 and 3.

(*n*) 4 & 5 W. 4. c. 76, entitled "An act for the amendment and better administration of the laws relating to

the poor in England and Wales."

(*o*) Sections 1. 2. 15. See also sect. 49. Their office was limited to five years; but was continued by 2 & 3 Vict. c. 83; 3 & 4 Vict. c. 42; and lately by 5 & 6

And it was enacted (*p*) that, except where otherwise thereby provided, all the powers and authorities given by the acts of 22 Geo. 3. c. 83, and 59 Geo. 3. c. 12, and all acts for amending such acts respectively, and also all the powers and authorities given by every other act of parliament, general as well as local, for or relating to the building, altering, or enlarging, of poorhouses and workhouses, and to the acquiring, purchasing, hiring, holding, selling, exchanging, and disposing thereof, or of land whereon the same might have been or might thereafter be erected, and of preparing such houses for the reception of poor persons, and the dieting, clothing, employing, and governing, of such poor, and the raising or borrowing of money for any of such purposes, and for repaying the same, and all powers of regulating and conducting all other workhouses whatsoever, and of governing, providing for, and employing the poor therein, and all powers auxiliary to any of the powers therein aforesaid, or in any way relating to the relief of the poor, should in future be exercised by the persons authorised by law to exercise the same, under the control and subject to the rules, orders, and regulations of the commissioners: Provided, that nothing therein contained should be construed to give the commissioners, or the assistant commissioners, any power to order the building, purchasing, hiring, altering, or enlarging of any workhouse, or the purchasing or hiring of any land at the charge, or for the use, of any parish or union, save and except so far as such powers were expressly thereby given.

The commissioners were empowered (*q*), from time to time, by writing under their hands and seal, with the consent in writing of a majority of the guardians (*r*) of any union (*s*), or

Vict. c. 57, until 31 July, 1847, and to the end of the then next session of parliament.

(*p*) Sect. 21.

(*q*) Sect. 23, and see s. 25.

(*r*) By sect. 109, it was declared that the word *guardian* should be construed to mean and include any visitor, governor, director, manager,

acting guardian, vestryman, or other officer in a parish or union, appointed or entitled to act as a manager of the poor, and in the distribution or ordering of the relief to the poor from the poor-rate, under any general or local act of parliament.

(*s*) The word *union* is to be construed to include any number of parishes

with the consent of a majority of the rate-payers and owners of property entitled to vote in manner thereafter prescribed, in any parish, to order the overseers or guardians of any parish or union not having a workhouse, to build a workhouse, and to purchase or hire land for the purpose of building the same thereon, or to purchase or hire a workhouse, or any building for the purpose of being used as, or converted into, a workhouse, and, with the like consent, to order the overseers or guardians of any parish or union having a workhouse, or any buildings capable of being converted into a workhouse, to enlarge or alter the same in such manner as the commissioners should deem most proper for carrying the provisions of the act into execution, or to build, hire, or purchase any additional workhouse, or any building for the purpose of being used as or converted into a workhouse, or to purchase or hire any land for building such additional workhouse thereon, as the commissioners should deem most proper for carrying the provisions of the act into execution.

By 5 & 6 W. 4. c. 69 (*t*), it was provided (*u*), that all the powers and authorities by the act of 59 Geo. 3. c. 12, given to churchwardens and overseers of the poor for taking land or ground into their hands, and for purchasing, hiring, and taking on lease, any land, should be exercised (under the control and subject to the rules, orders, and regulations, of the poor law commissioners,) by the overseers of the poor in any parish not under the management of a board of guardians, and by the guardians of the poor of any union or parish formed or established by virtue of any statute or local act.

Doubts having been entertained on the subject, it was legislatively declared (*x*), that the acts of 4 & 5 Wm. 4. c. 76,

united for any purpose whatever under the provisions of the act of 4 & 5 W. 4. c. 76, or incorporated under the act of 22 Geo. 3. c. 83, or incorporated for the relief or maintenance of the poor under any local act.

(*t*) 5 & 6 W. 4. c. 69, entitled "An act to facilitate the conveyance of workhouses and other property of pa-

ishes and of incorporations or unions of parishes in England and Wales."

(*u*) Sect. 4.

(*x*) 1 Vict. c. 50, entitled "An act to facilitate the conveyance of lands and buildings for the purposes of two acts passed respectively in the 5th and 6th years of his late Majesty King William the 4th." Sect. 1.

and 5 & 6 W. 4. c. 69, did apply to and comprise lands and buildings and other hereditaments of copyhold or customary tenure, as well as lands, buildings, and other hereditaments, of freehold tenure.

And by an act lately passed (*y*), every board of guardians constituted under the act of 4 & 5 Wm. 4. c. 76, is empowered (*z*) to accept, take, and hold, on behalf of the union or parish respectively for which they may act, any lands, buildings, goods, effects, or other property, as a corporation, and in all cases to sue and be sued in their corporate name.

As churchwardens and overseers have no corporate seal, it appears that they cannot appoint an attorney (*a*).

It would seem (*b*) that a lease made in pursuance of the act of 4 & 5 Wm. 4. c. 76, is not liable to stamp duty; though the point is not clear.

(*y*) 5 & 6 Vict. c. 57, entitled "An act to continue until the 31st day of July, 1847, and to the end of the then next session of parliament, the poor law commission; and for the further amendment of the laws relating to the

poor in England."

(*z*) Sect. 16.

(*a*) Ex parte Annesley; *mre* Stratford Bridge Improvement Act, 2 Yo. & Col. Exch. 350.

(*b*) 4 & 5 W. 4. c. 76. s. 86.

CHAPTER III.

OF LEASES BETWEEN PARTICULAR INDIVIDUALS.

*By Principal to Steward or Agent—By Client to Attorney—
By Ward to Guardian—By Cestui que trust to Trustee—
By Mortgagor to Mortgagee.*

LEASES granted to agents or stewards by their principals or employers; to attorneys by their clients; to guardians by their wards, soon after attaining their majority; to trustees by their cestuis que trust, and others in similar fiduciary situations, though unimpeachable at law, are viewed with the utmost jealousy in equity, lest an undue advantage should be taken by the lessees of the influence or knowledge acquired by them in their confidential character; and the slightest appearance of unfair dealing will suffice to invalidate the transaction.

But there is no rule of policy, even in equity, which absolutely prohibits a steward, agent, or attorney, from being the lessee of his employer, principal, or client (*a*). And a lease purely voluntary may be granted from motives of kindness and friendship, even during the continuance of the relation; nor can it be annulled, unless misrepresentation, circumvention, or undue means, be resorted to for the purpose of influencing the lessor. The slightest hint, however, in the answer to a bill, or in the evidence, that the lessee had laid before

(*a*) *Harris v. Tremeneere*, 15 Ves. 34. *Lord Selsey v. Rhoades*, 2 Sim. & Stu. 41. 49; S. C., on appeal, 1 Bli. P. C., N. S., 1. *Ward v. Hartpole*, 3 Bli. P. C. 470. *Hunter v. Atkins*, 3 Myl. & Keen, 113. 135. *Jones v. Thomas*, 2 Yo. & Col. Exch. 498. 519. *Ker v.*

Lord Dungannon, 1 Dru. & War. 509. 542. *Molony v. Kernan*, 2 Dru. & War. 31. 33. *Andrews v. Mowbray*, 1 Wils. Exch. 71. 73. And see *Dent v. Bennett*, 4 Myl. & Cr. 269, as to an agreement between a patient and his medical attendant.

the lessor an account of the value of the premises, which was not perfectly accurate, will be a sufficient inducement for the court to set aside such lease, whatever the parties might intend, upon the general ground, that the principal never would be safe if the agent could take a gift from him upon a representation that was not most accurate and precise (*b*).

If the lease be granted to the agent, not gratuitously, but upon consideration, if any doubt be raised, it is incumbent on the lessee to shew that he made as good a bargain for his employer, as against himself, as a provident, well managing, honorable steward, acting most adversely, in a fair sense, would; and that he paid the full amount that he could have obtained from any other person (*c*). Thus, the lease in the case of *Ward v. Hartpole* (*d*) was set aside, the lessee, who was the agent and attorney of the lessor, having obtained it for a consideration grossly inadequate, the circumstances of the lessor being at the time in an extremely embarrassed state. And, in like manner, where a reversionary lease was granted to commence upon the determination of a life of seventy, contrary to a former resolution by the lessor not to grant another reversionary lease where only one life above the age of sixty was existing, and the consideration professed to have been given for the lease was 150*l.*, Lord Eldon thought that the defendant should have produced evidence, in support of the transaction, that the consideration was adequate; for the fairness of the bargain was not to be presumed; and as he had failed to do so, an issue was directed;

(*b*) *Harris v. Tremenhore*, 15 Ves. 39, 40, per Lord Eldon. *Hunter v. Atkins*, 3 Myl. & Keen, 138. *Ker v. Lord Dungaunon*, 1 Dru. & War. 509. 542.

(*c*) *Harris v. Tremenhore*, 15 Ves. 42. *Lord Selsey v. Rhoades*, 2 Sim. & Stn. 50. *Beaumont v. Bousbee*, 5 Ves. 485; S. C. 7 Ves. 599; 11 Ves. 358. *Lady Ormond v. Hutchinson*, 13 Ves. 47; 16 Ves. 94. *Medlicott v.*

O'Donel, 1 Ball & Beat. 164. *Hunter v. Atkins*, 3 Myl. & Keen, 135. 140. *Champion v. Rigby*, 1 Russ. & Myl. 539; S. C. 1 Taml. 421. And see *Rossiter v. Walsh*, 2 Con & Law. 563; S. C. 4 Dru. & War. 485, noticed ante, p. 391.

(*d*) *Ward v. Hartpole*, 3 Bli. P. C. 470. And *Gartside v. Isherwood*, 1 Bro. C. C. 558, Appendix, 5th ed. by Belt.

and the verdict upon the trial being against the adequacy of the consideration, a decree was made directing the lease to be delivered up (*e*).

The same equity affects an assignee of the lease with notice (*f*).

Notwithstanding Lord Eldon's remark in *Harris v. Tremenheere* (*g*), that when the grant is founded on a proposal for purchase, the court will not permit motives of kindness and gratuity to be mixed with it, it is said, in the more recent case of *Lord Selsey v. Rhoades* (*h*), that the transaction may be founded partly on a pecuniary consideration, and partly on motives of bounty; but that, where the consideration is thus mixed, the steward is bound to make out that his employer was fully apprised of every circumstance respecting the property which either was or ought to have been within the knowledge of the steward, and which could tend to demonstrate the value of the property, and the precise measure and extent of the bounty of the employer.

In all cases of this kind, to avoid the suspicion of unfair dealing, the party contracting for the lease should avail himself of the mediation of a third person; the neglect of this precaution being sufficient to justify an examination (*i*). The court, said Lord Eldon, never ought to give costs upon the result of that examination, where the party has not interposed any other person (*k*); and in the case of *Selsey v. Rhoades*, he refused the costs of the appeal, declaring at the same time that he should not have given costs in the court below, as had been done by the Vice-Chancellor (*l*). The costs which

(*e*) *Harris v. Tremenheere*, sup.

(*f*) *Ker v. Lord Dungannon*, 1 *Drn.* & *War.* 509. *Molony v. Kernan*, 2 *Dru.* & *War.* 31.

(*g*) 15 *Ves.* 42.

(*h*) *Lord Selsey v. Rhoades*, 2 *Sim.* & *Stn.* 50, per Leach, V. C.; S. C. 1 *Bli. P. C. N. S.* 1. And see *Dawson v. Massey*, 1 *Ball & Beat.* 235. *Lord Kingsland v. Barnewall*, 1 *Bro. P. C.*

164; *Toml. ed. vol. 4, p. 154*; *Jour. vol. 18, p. 264*. *Rhodes v. Beauvoir*, 6 *Bli. P. C. N. S.* 195.

(*i*) *Harris v. Tremenheere*, 15 *Ves.* 40-1. *Hunter v. Atkins*, 3 *Myl. & Keen*, 137, *et seq.* *Watt v. Grove, Grove v. Watt*, 2 *Scho. & Lef.* 492. 502.

(*k*) *Ibid.* And see *Medlicott v. O'Donel*, 1 *Ball & Beat.* 156.

(*l*) 1 *Bli. P. C. N. S.* 8.

were allowed on the dismissal of the bill in *Harris v. Tremeneere*, as to some of the voluntary leases granted to the defendant, were given on the ground of such leases being an inducement to, and provision upon, the defendant's marriage.

But, on setting aside leases so granted, the lessee will be allowed credit for valuable and lasting improvements of the property (*m*).

Length of acquiescence, however, or acts of confirmation, may give validity to leases which could not originally have been supported had means been resorted to within a reasonable time for the purpose of setting them aside. Thus, in *Medlicott v. O'Donel* (*n*), where the plaintiff had slept upon his title for twenty-seven years, during which period the defendant was altogether divested of the fiduciary character of agent, and every other character which could have infected the transaction had ceased to subsist, the court refused to interpose to vacate the leases. The same rule prevailed in the case of *Lord Selsey v. Rhoades* (*o*). James Lord Selsey, being tenant for life with power of leasing, in the year 1804, concurred with Mr. Peachy, his son, the next tenant for life, in an agreement with the defendant, their steward, to grant him a lease for twenty-one years, under circumstances which it is not necessary to particularize. On Lord Selsey's death in 1808, Mr Peachy (then John Lord Selsey) became tenant for life, and executed a lease in 1809 according to the terms of the agreement. He died in 1816, when the reversion became vested in the appellant, who delayed the filing of his bill till 1821, having in the meantime accepted the rent reserved in the lease. "I have looked," said Lord Eldon (*p*), "into this case with a desire to affect the lease; for the situation of the parties was such as to induce a court of equity to look at the transaction with great suspicion. If the suit had

(*m*) *Watt v. Grove*, *Grove v. Watt*, 2 Scho. & Lef. 492. 513. *Attorney-General v. Baliol College*, Oxford, 9 Mod. 411. *Ward v. Hartpole*, 3 Bli. P. C. 470. 490.

(*n*) *Medlicott v. O'Donel*, 1 Ball &

Beat. 156. 164. And see *Blakeney v. Bagott*, 3 Bli. P. C. N. S. 237. *Champion v. Rigby*, 1 Russ. & Myl. 539; *S. C.* Taml. 421.

(*o*) *Supra*.

(*p*) 1 Bli. P. C. N. S. 8.

been instituted recently after the contract, and there had been no acts of confirmation, probably the lease might not have stood; but James Lord Selsey and John Lord Selsey acquiesced so long, being well acquainted with the facts, that it is difficult to say that they could have impeached the lease, and the appellant cannot do that which they could not have done." There is no limited time, however, within which relief must be sought; every case must depend on the peculiar circumstances which give rise to the application.

Leases granted by a client to his attorney are governed by the same principles as those between employer and steward (*q*).

As to leases taken by a guardian of his ward, it was said by L. C. Manners (*r*), "Generally speaking, there are no transactions in a man's life that ought in this court to be more scrupulously or with more jealousy examined, than those which occur recently after the ward attains the age of twenty-one, affecting his real property. Antecedent to that period his infancy is his protection, his disabilities are his security; but instantly after he attains the age of twenty-one, as if he had acquired all the prudence and experience necessary to the management or disposal of his property, with the possession are given the absolute control and dominion over his estates. At law, all his acts are binding, all his deeds are valid, unless, upon some distinct case of fraud, they can be impeached; but it is not so in this court: those relations of guardian and ward, principal and agent, trustee and cestui que trust, which are little regarded in a court of law, are in this court decisive against the validity of a transaction which between strangers could not be impeached."

This last position carries the doctrine higher than, perhaps, is recommended by sound policy; and, as to principal and

(*q*) *Harris v. Tremeneheere*, sup. *Lord Selsey v. Rhoades*, sup. *Ward v. Hartpole*, sup. *Watt v. Grove*, *Grove v. Watt*, 2 Scho. & Lef. 492. 503. And see *Kenny v. Browne*, 3 Ridg. P. C. 462. *Blakeney v. Bagott*, 3 Bli. P. C. N. S. 237. *Jones v.*

Thomas, 2 Yo. & Col. Exch. 498. *Champion v. Rigby*, 1 Russ. & Myl. 539; S. C. Tambl. 421. *Rhodes v. Beauvoir*, 6 Bli. P. C. N. S. 195.

(*r*) *Dawson v. Massey*, 1 Ball & Beat. 232.

agent, and trustee and cestui que trust, at least, is certainly inconsistent with the cases previously cited in this chapter. Without doubt, however, transactions between guardian and ward, occurring soon after the determination of the relation, require the most satisfactory proof of fair dealing to support them.

In the case of *Dawson v. Massey* (s), Mr. Massey, the defendant, and the plaintiff's uncle, had been agent to the plaintiff's father for thirty years, and in that capacity had acquired an intimate knowledge of the nature and value of the estate. He then became guardian to the plaintiff, who was a young man educated in England, and had not seen his estate since he was a boy. In September 1800, the plaintiff came of age, and then apprised his uncle of his intention to appoint an agent: the uncle, displeased at his so doing, urged him strongly against it, and made use of the expression, "that no one could acquire a knowledge of the estate for years." The plaintiff, however, did appoint one John Massey, (not the defendant) his agent, and went over to Ireland assisted by him, and immediately after entered into a treaty with his uncle, who then obtained five leases of different parts of his nephew's estate; some for ever, and the remainder for four lives, the latter containing clauses of surrender: and the uncle soon afterwards underlet those lands at a profit rent of nearly 1300*l.* per annum. It appeared from the depositions of John Massey, the plaintiff's agent, that the lands were let at an undervalue; that the defendant refused to treat with him, and actually turned him out of the room when he was treating with the plaintiff for a lease, for having offered his opinion as to the value. It also appeared that the uncle, an elderly man without children, had a considerable influence over his nephew, then very inexperienced in the value of his estates; and that he held out inducements both to Massey, the agent, and to the plaintiff, by letter, stating that whatever interest he got in the leases would ulti-

(s) *Dawson v. Massey*, 1 Ball & Beat. 219.

mately be for the benefit of the plaintiff. It was also proved that persons who would have bid for some parts of the lands taken by the defendant declined doing so, finding that he had proposed for them. It appeared that, before the defendant got leases of the principal part of the estate, the plaintiff and his agent visited them, and received several proposals for leases which were not accepted. Upon these grounds, as well as upon the ground of the subsisting influence of the uncle over the nephew, though the relation of guardian and ward had ceased, and of the absence of all security for the inducement held out that the transaction would ultimately tend to the advantage of the plaintiff, the court decreed the leases to be set aside, and gave the plaintiff his costs.

As to the dealing being one of a family nature, an arrangement between the uncle and nephew, so that the full value of the property or the highest rent was not to be taken as the only consideration between the parties, or the criterion by which the court was to form a judgment of its fairness, his lordship said, that that was not the ground upon which the defence was rested, nor was there any proof of it (*t*); and, indeed, he should expect some very satisfactory evidence before he could act upon such a case; something to show that the young man was well advised, and that there was some security for what was held out; but the declaration by the defendant to the plaintiff's agent was calculated only to silence the agent, and to keep in check his activity and exertion (*u*).

The same doctrine was adhered to in the case of *Mulhallen v. Marum* (*x*), where a lease perpetually renewable made by a party shortly after the attainment of his majority to a person standing in the relation of his guardian, agent, receiver, and tenant, was set aside on grounds of public policy, notwithstanding the plaintiff had delayed the filing of his bill for eleven years after the grant of the lease.

(*t*) See *Watt v. Grove*, *Grove v. Watt*, 2 Scho. & Lef. 492. 501, per Lord Redesdale, C.

(*u*) 1 Ball & Beat. 235.

(*x*) *Mulhallen v. Marum*, 3 Dru. & War. 317.

And in *Aylward v. Kearney* (*y*), a lease obtained by the guardian's son from the ward a few years after he came of age was set aside thirty years after its execution, the ward being of weak understanding, and continuing during his life under the control and influence of the guardian and his family. The length of time was not considered, under the circumstances, to amount to a bar.

A lease is not void, even in equity, simply from the circumstance of its being granted by a mortgagor to his mortgagee; but if there be anything more, the court will look into the transaction with the greatest possible jealousy (*z*). In the case cited, the lease was set aside, the mortgagee having obtained it at an unfair value, in consequence of the distressed circumstances of the lessor.

(*y*) *Aylward v. Kearney*, 2 Ball & Beat. 463.

(*z*) *Gubbins v. Creed*, 2 Scho. & Lef. 214.

CHAPTER IV.

OF THE CONTRACT OR AGREEMENT.

IN the preceding parts of this work we have shown by and to whom leases may be granted, whether the contracting capacity relate to person, estate, number and connection, or office ; but as every lease actually granted must necessarily be preceded by an executory contract, either verbal or written, it becomes necessary to advert to the requisites, form, construction, and effect, of such contract ; an inquiry that may be advantageously entered upon before we investigate the law connected with the duration of the lease, its essential and formal parts, and means of determination.

This will open an extensive field for examination ; and without due caution would lead to discussions claiming but a remote relation to the principal design in view. Aware of the consequences of deviating from certain prescribed limits, I must, in endeavouring to explain this branch of my treatise, confine myself, with very few exceptions, to those cases which have been determined on *Agreements for leases* only.

In pursuing this inquiry, we may consider,

I. What is a sufficient signature of the agreement within the statute of frauds :

II. In what cases Equity dispenses with the necessity of signature on the ground of part performance :

III. The form ; distinguishing herein agreements for leases from leases :

IV. The effect and consequences of the agreement ; particularly with reference to specific performance ; and

V. The admissibility of parol evidence to explain or annul the written agreement.

SECTION I.—WITH REGARD TO THE SIGNATURE.

The fourth section of the statute of frauds (*a*) enacts, that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages, of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

The signature contemplated by the statute must be such as will amount to an acknowledgment by the party that the agreement is his: and unless the name give such authenticity to the instrument, it cannot amount to what the statute requires. The mere insertion by a party, in his own handwriting, of his name in the body of a memorandum of an agreement for a lease, for example, "Mrs. Stokes to pay Moore 2*l.* half yearly" is not a formal signature within the meaning of the act (*b*). It is perhaps difficult, except in the case of a letter with a postscript, to find an instance where a name inserted in the middle of a writing can well have that effect; and there the name being generally found in a particular place by the common usage of mankind may very probably have the effect of a legal signature, and extend to the whole (*c*). Nor will the circumstance of a party altering a draft of conveyance, and delivering it to the attorney to be engrossed, amount to a signing (*d*). Nor is the statute com-

(*a*) 29 Car. 2. c. 3.

(*b*) Stokes v. Moore, 1 Cox, 219.

(*c*) *Ibid.*

(*d*) Hawkins v. Holmes, 1 P. Wms.

770. Lowther v. Carill, 1 Vern. 221.

plied with, unless the agreement, though entirely written with the party's hand, be likewise signed by him, or something equivalent be done; the absence of signature being evidence that the party considers the instrument incomplete (*e*). So, the bare entry of a steward in his lord's contract book with his tenants is not evidence, of itself, of an agreement for a lease between the lord and a tenant (*f*).

But where an agreement has been reduced to a certainty, and the statute has been complied with in a material part, the forms are never insisted on. Upon this principle, it was determined, that the subscribing of an agreement, as a witness only, by one who was acquainted with the contents, was sufficient (*g*). It is, therefore, clear, that the person sought to be charged need not be a party to the instrument in the technical sense of that word: the term *party* in the statute signifying no more than *person* in general (*h*). Sealing is in no case necessary (*i*).

An instrument, however, not originally binding as an agreement may, by subsequent acts of reference and acknowledgment, for it is not necessary that the note in writing should be contemporaneous with the agreement (*k*), constitute a valid contract within the terms of the statute (*l*). A landlord, in 1781, treating for a lease, in order to render the agreement clear and certain, entered, in his own handwriting, in a book of register, the heads and import of the agreement, and described, in the form of a map, the farm, with the metes and boundaries thereof, under which he wrote, "fifty-eight acres, two rods, and five perches: lives of Isaac Finnamore, aged twelve; Mary Finnamore, aged eleven; Deborah Finnamore, aged six; children of Thomas Finnamore; at twelve shillings per acre, from the 1st of May, 1781"; and, afterwards, in consequence of an application for a specific perform-

(*e*) *Bawdes v. Amhurst*, Free. Ch. 402.

(*f*) *Charlewood v. Duke of Bedford*, 1 Atk. 497.

(*g*) *Walford v. Beazely*, 3 Atk. 503; S. C. 1 Ves. 6.

(*h*) *Ibid.*

(*i*) *Wheeler v. Newton*, Free. Ch. 16; S. C. 2 Eq. Ca. Ab. 44, pl. 5.

(*k*) *Shippey v. Derrison*, 5 Esp. 190.

(*l*) *Powell v. Dillon*, 2 Ball & Beat. 416. *Verlander v. Codd*, 1 Turn. & Russ. 352.

ance, wrote the following letter to Hall his steward :—" Hall, I request you to give Mr. Powell the article from me to Thomas Finnamore, about the quarry or Hill farm, that he may get leases drawn. R. Neville, May 9, 1805." The court held, that the instrument, when connected with Neville's letter, contained every requisite pointed out by the statute (*m*).

So, where one having contracted by parol to take a lease, but being unable to perform his agreement, by indorsement on the draft of the lease, required the plaintiff to cancel it in these terms :—" I hereby request Mr. Shippey to endeavour to let the premises to some other person, as it will be inconvenient to me to perform my agreement for them ; and for so doing this shall be a sufficient authority, J. Derrison", it was held, that the indorsement under the hand of the party, expressing that he had entered into the agreement, was a clear recognition and adoption of a prior contract, and was sufficient to satisfy the statute (*n*).

Notwithstanding the doubt thrown out upon the point by Lord Redesdale (*o*), the better opinion, founded on more recent consideration (*p*), is, that an agreement may be specifically enforced against a defendant who has signed it, although it be not signed by the party seeking the performance ; and that such an agreement may be the foundation of an action at law (*q*). The words of the act (*r*), indeed, seem to admit of no other interpretation. A very early case (*s*) is commonly quoted in confirmation of, and, as reported in the cases in Chancery, fully justifies, this doctrine. It there appears, that A. sold certain houses to B. for 2000*l.*, and A. drew up a note of the agreement in writing, which B. signed,

(*m*) *Powell v. Dillon*, sup. And see *Parker v. Smith*, 1 Col. 603.

(*n*) *Shippey v. Derrison*, sup.

(*o*) *Lawrenson v. Butler*, 1 Scho. & Lef. 13.

(*p*) *Fowle v. Freeman*, 9 Ves. 351. *Huddleston v. Briscoe*, 11 Ves. 592. *Allen v. Bennet*, 3 Taunt. 176. *O'Rourke v. Percival*, 2 Ball & Beat. 58. *Lord Ormond v. Anderson*, 2 Ball & Beat. 363. 370. *Western v. Russell*, 3 Ves.

& B. 192. *Martin v. Mitchell*, 2 Jac. & Walk. 426-7. *Dowell v. Dew*, 1 Yo. & Col. V. C. 345. 356. *Sutherland v. Briggs*, 1 Hare, 26. 34.

(*q*) *Laythorp v. Bryant*, 2 Bing. N. C. 735; S. C. 3 Scott, 238.

(*r*) "Signed by the party to be charged therewith," &c.

(*s*) *Hatton v. Gray*, 2 Ch. Ca. 164; S. C. 1 Eq. Ca. Ab. 21. pl. 10.

but A. did not; and that a decree for a specific execution of this agreement was made in favor of A.; but no reasons are given. In another book (*t*), the decree is stated to have been for A., for as he drew up a note of the agreement in his own hand, and procured B. to sign it on his part, the signing of B. was not only a signing for himself, but as authorised by A. to close the agreement; and, therefore, if B. had come into a court of equity against A., the court would have decreed the agreement against A., and therefore *vice versâ*. But this reason rather militates against, than supports the proposition, as it would seem that the decision was grounded on the circumstance of the agreement being virtually signed by the plaintiff. Whether the kind of reasoning of the court would be now sanctioned is a different question: probably it would not (*u*); but as the case stands, it seems to be an authority for the reverse of what it is usually cited to prove. At all events, if the party who is not bound has endeavoured to obtain an undue advantage, or has been playing what is called fast and loose, equity will not assist him (*x*).



SECTION II.—IN WHAT CASES EQUITY DISPENSES WITH SIGNATURE ON THE GROUND OF PART PERFORMANCE.

A strict compliance with the provisions of the statute is not in all cases indispensable to the completion of the contract in equity. Where the agreement has been substantially in part performed, the court will decree its specific execution, notwithstanding it be unsigned, or not even reduced to writing (*y*). Mr. Justice Buller once (*z*) conceived that part performance took a case out of the statute at law as well as in equity; but, being pressed with the consequences of that

(*t*) Gilb. Lex Præc. p. 240.

(*u*) Wright v. Dannah, 2 Campb. 203.

(*x*) Lord Ormond v. Anderson, 2 Ball & Beat. 363. 371.

(*y*) Lester v. Foxcroft, Colles P. C.

103; cited, Gilb. Eq. Rep. 4 and 11; 2 Vern. 456. Anon. 5 Vin. Ab. 522. pl. 38.

(*z*) 1 Bro. C. C. 413. 417. Brodie v. St. Paul, 1 Ves. jun. 333.

opinion in case of a demurrer to evidence, was obliged to abandon it (*a*).

What will amount to a part performance must of course depend, in general, on the nature of the transaction itself; but it is well established that the act must unequivocally refer to, and result from, the agreement, and be such that the party would suffer an injury, amounting to fraud, by a refusal to execute the agreement: it must be of such a nature that, if mentioned, it would of itself infer the existence of some agreement; and then parol evidence is admitted to show what the agreement is (*b*).

By a long series of authorities (*c*), it is settled, in opposition to a case decided soon after the passing of the statute (*d*), which cannot now be recognised as law (*e*), that disbursement of money by the lessee in improving the premises is such a part performance as will preclude the lessor from availing himself of that statute. But a distinction has been drawn between an outlay for necessary repairs or lasting improvements, and money paid for fancy or humour; and it would seem that the latter will not afford a means of escape from the statute (*f*).

In order to bring a case within the exemption, it is not necessary that the lessor should actively promote the lessee's expenditure: if knowingly, though but passively, he encourage him to lay out money under an erroneous opinion of title, and permit those acts which he would not have done, and the lessor must conceive he would not have done, but upon an expectation that an objection would not be thrown in the way of his enjoyment, a specific performance will be

(*a*) *Cooth v. Jackson*, 6 Ves. 39. *O'Herlihy v. Hedges*, 1 Scho. & Lef. 130.

(*b*) *Frame v. Dawson*, 14 Ves. 386.

(*c*) *Scagood v. Meale*, Prec. Ch. 561. 5 Vin. Ab. 522, pl. 38. *Smith v. Turner*, cited, Prec. Ch. 561; S. C. 5 Vin. Ab. 523, pl. 41. *Wills v. Stradling*, 3 Ves. 378. *Lester v. Foxcroft*, Colles P. C. 103. *Toole v. Medlicott*, 1 Ball & Beat. 393. *Gregory v. Mighell*, 18

Ves. 328. And see *Marshall v. The Corporation of Queenborough*, 1 Sim. & Stu. 520.

(*d*) *Hollis v. Whiteing*, 1 Vern. 151. *Hollis v. Edwards*, and *Deane v. Izard*, 1 Vern. 159.

(*e*) *Whitchurch v. Bevis*, 2 Bro. C. C. 565.

(*f*) *Hollis v. Edwards*, sup.; but see 1 Bro. C. C. 417.

decreed in the tenant's favor (*g*). And the circumstance of looking on is in many cases as strong as using terms of encouragement (*h*). Still, it must be put upon the lessee to prove such a case by cogent evidence, leaving no reasonable doubt that he acted upon the encouragement suggested (*i*).

In the late case of *Sutherland v. Briggs* (*k*), the plaintiff was the lessee of a house and some cottages adjoining for a term of thirty-one years, at a rent of 60*l.*, and was under a covenant to take down two of the cottages, and build a house upon the site, with suitable offices. He was also tenant from year to year of an adjoining meadow, belonging to a different proprietor, at a rent of 9*l.* The lessor of the house became the purchaser of the meadow, and a treaty proceeded between him and the plaintiff with regard to certain proposed repairs and alterations in the house, in consequence of which, the house was made to project over the meadow, part of which was attached to the demised premises, the costs and expenses, far exceeding the sum he had originally covenanted to lay out, being paid by the plaintiff and lessor in nearly equal moieties. The following memorandum was then drawn up by the lessor, and signed by the plaintiff:—"Mr. Frampton having advanced me the sum of 350*l.* towards the additions and improvements lately made by me to the house and premises at Hayes in my occupation, in addition to 150*l.* previously allowed me for rebuilding the adjoining cottage, it is agreed that the rent of 69*l.* now paid for the house, &c., and field, shall be increased to 80*l.* a year, clear of all deductions whatsoever, commencing from Christmas last, dated the 3rd day of February 1836.—A. Sutherland." An ejectment for the meadow having been brought against the plaintiff, he filed his bill, praying a declaration by the court that he was entitled to the tenancy and occupation of it for the residue of the term of thirty-one years which he had in the house, and for an injunction; and it was decreed accordingly. The V. C. observed, that if the act of extending the house, in

(*g*) *Dann v. Spurrier*, 7 Ves. 231.

(*h*) *Ibid.*

(*i*) *Ibid.*

(*k*) *Sutherland v. Briggs*, 1 Hare, 26.

which the tenant had an interest for a term of years, into the meadow, with the landlord's consent were not evidence of a contract between them, he knew not what act on the part of a tenant in possession of property could possibly be so considered; and he held that, notwithstanding the memorandum of the 3rd of February, 1836, did not mention the term during which the plaintiff was to hold the meadow, yet enough was proved to support the allegation in the bill, that the time for which he was to hold it was to be commensurate with his lease of the house; and that the reservation of one entire rent of 80*l.* for the whole and every part of the consolidated property was sufficient to determine the question, and show that the whole was to endure for the same period; and he further held, that the justice of the case would not be satisfied by giving to the plaintiff so much of the meadow as the house stood upon, as the act of building part of the house upon it was an act affecting the whole tenement, namely the meadow, and not that part of it only on which the house stood.

It is almost needless to observe, that if no expense be incurred by the lessee, a bare promise of a lease, being in direct contravention of the statute, cannot be enforced (*l*).

Although courts of equity are disposed to go every possible length to assist a party in obtaining reimbursement of expenditure upon another's property, of the benefit of which he may have been deprived by the exercise of a legal right, as by the determination of a tenancy from year to year, yet there is no case in which a lessee, either of a term, or from year to year, making any improvement upon the estate in his possession, though with the complete knowledge of the landlord, has been held entitled, as against that landlord, to have his lease prolonged until he shall obtain reimbursement for the improvements he has made; for he has a title of which he knows the duration. He is not under a mistake with regard to the nature of his title. He may perhaps be guilty of great imprudence, if the expectation that his lease will be renewed, or his possession from year to year continued, prove

(*l*) *Seagood v. Meale*, *Proc. Ch.* 561. *Smith v. Turner*, cited, *ibid.*

unfounded. But because that expectation is disappointed, the court cannot say that he has acquired a right to a prolongation of his lease, or to a lease for a certain period (*m*). If, however, a landlord enter into an arrangement with a tenant relative to improvements, and so completely sanction them, as himself to agree to advance part of the money, implying that another part is to be in advance by the tenant, it seems that an equity is fastened upon the landlord, precluding him, when these improvements are made under his authority, from saying there is an end of the lease. Such an arrangement, though without a specific agreement, would imply one; as it would be so contrary to good faith to encourage a tenant in so positive and direct a manner to proceed in particular improvements, and then deny him all benefit, that equity would probably interfere, and hold it an implied term that the tenant should have the fair benefit from the improvements thus made with the concurrence of the landlord (*n*).

In like manner, even the entry of the lessee into the premises, if distinctly referable to the contract alleged in the pleadings, will constitute a part performance (*o*); the delivery of possession by a party in enjoyment to the person claiming under the agreement being a strong and marked circumstance to take the case out of the statute (*p*); for the tenant is thus protected from any liability as a trespasser, and the landlord disabled from dealing with any other person (*q*). But it must be clear that possession is taken with a view to a part performance; a wrongful entry will not avail (*r*); and the transfer of enjoyment must be unequivocally connected with the transaction in question; hence, if the agreement (not in

(*m*) *Pilling v. Armitage*, 12 Ves. 85.

(*n*) *Pilling v. Armitage*, 12 Ves. 88.
And see *Sutherland v. Briggs*, 1 Hare, 26.

(*o*) *Earl of Aylesford's case*, 2 Stra. 783. *Lacon v. Mertins*, 3 Atk. 4. *Anon.* 5 Vin. Ab. 523. pl. 40. *Gregory v. Mighell*, 18 Ves. 333. *Boardman v. Mostyn*, 6 Ves. 470. *Morphett v. Jones*, 1 Swaust. 181; S. C. 1 Wils.

100. *Palmer v. White, Wallis*, by Lyne, 10. *Attwood v. Barham*, 2 Russ. 186. See, however, *Seagood v. Meale*, Prec. Ch. 561.

(*p*) *Wills v. Stradling*, 3 Ves. 378.
(*q*) *Kine v. Balfe*, 2 Ball & Beat. 343. 348.

(*r*) *Cole v. White*, cited, 1 Bro. C. C. 409.

writing) be for an extension of the term of a lease, the mere fact of the possession being continued by the lessee, who of course remains in possession until he receives notice to quit, can have no weight in taking the case out of the statute, or even call for an answer (*s*).

Acts which are merely introductory or ancillary to the agreement, as giving instructions for a lease (*t*), &c., though attended with expense, are not considered a part performance (*u*); nor are acts, equivocal in themselves, or easily admitting of compensation. Therefore, where a tenant in possession, under an intimation from his landlord that he might be induced to grant a further term of ten years, but without any absolute promise or agreement, expended a considerable sum in rebuilding a party-wall, the court refused his claim for an extension of his term, first, because the act was equivocal, and would have taken place equally if there had not been any agreement; and, secondly, because the money might be recovered from the landlord if the expense was to be borne by him, and the parties be thus restored to their former situation; and the circumstance of the lessee's being obliged to resort to an action to recover his money was not deemed a reason for taking the case out of the statute (*x*).

So, where there was a parol agreement between the plaintiff and defendant, that, upon the former obtaining from one Hammond a release of his claim to a certain messuage, the defendant would grant him, the plaintiff, a lease thereof, and the plaintiff obtained the release upon consideration of his giving Hammond the free admission to the Pantheon, value 15*l.* per annum, the court was of opinion that this was merely a preparatory act, and no part performance (*y*).

Payment of an additional rent is also of itself too equivocal

(*s*) *Wills v. Stradling*, 3 Ves. 373.
Morphett v. Jones, sup. *Seagood v.*
Meale, Prec. Ch. 561. *Savage v. Car-*
roll, 1 Ball & Beat. 265. *O'Rourke*
v. Percival, 2 Ball & Beat. 63.

(*t*) 1 Bro. C. C. 409. And see

Bawdes v. Amburst, Prec. Ch. 402.

(*u*) *Whitbread v. Brockhurst*, 1 Bro. C. C. 412.

(*x*) *Frame v. Dawson*, 14 Ves. 386.

(*y*) *O'Reilly v. Thompson*, 2 Cox, 271.

a circumstance to prevent the application of the statute (*z*). But where a lessee before the expiration of his term entered into a parol agreement for an extension of it, at a different rent, and possession was continued for a period exceeding twenty years, and the new rent paid and received accordingly, the agreement was considered to have been sufficiently carried into execution, and a specific performance decreed (*a*).

Whether the payment of a part or the whole of the consideration or purchase money would be deemed a part performance, has long been a subject of controversy, but the court seems now inclined to the negative (*b*). Indeed, as the ground upon which relief is administered in these cases is fraud (*c*), it may be stated, as a general rule, that nothing amounts to a part performance that does not put the party in a situation that is a fraud upon him if the agreement be not fulfilled (*d*); and as repayment, especially with interest, is deemed to place the parties in their former situation, payment of money is not deemed a part performance (*e*).

And here we may remark, that although a written agreement for a lease, made in pursuance of a power by a tenant for life, may be enforced in equity against the remainderman (*f*); yet, if the agreement be by parol, the remainderman will not be bound, even though it be partly performed; as the ground of relief in cases of part performance is fraud, and fraud is personal (*g*). He might be affected with fraud, by showing that an expenditure had been permitted by him, with a knowledge that the party had only a parol agreement from the tenant for life (*h*), or by proving his acquiescence,

(*z*) *Wills v. Stradling*, 3 Ves. 378.
Lindsay v. Lynch, 2 Scho. & Lef. 1.

(*a*) *Lord Desart v. Goddard*, Wallis, by Lyne, 347.

(*b*) *Clinan v. Cooke*, 1 Scho. & Lef. 40. *O'Herlihy v. Hedges*, 1 Scho. & Lef. 123. *Frame v. Dawson*, 14 Ves. 388.

(*c*) *Seagood v. Meale*, Prec. Ch. 561.
Hawkins v. Holmes, 1 P. Wms. 771.
Clinan v. Cooke, 1 Scho. & Lef. 41.

Morphett v. Jones, 1 Swanst. 181;
S. C. 1 Wils. 100. *O'Herlihy v. Hedges*, 1 Scho. & Lef. 130.

(*d*) *Clinan v. Cooke*, sup.

(*e*) *Ibid*.

(*f*) *Shannon v. Bradstreet*, 1 Scho. & Lef. 52. *Blore v. Sutton*, 3 Meriv. 247. *Lowe v. Swift*, 2 Ball & Beat. 529.

(*g*) *Ibid*.

(*h*) *Blore v. Sutton*, 3 Meriv. 247.

and receipt of rent for several years, after the death of the tenant for life (*i*); but, without knowledge, there is nothing in the mere circumstance of expenditure to bind him (*k*).

Lord Alvanley was of opinion, that the court had gone rather too far in permitting the statute to be evaded by part performance, and in admitting parol evidence of the contents of the agreement; and he thought that, instead of holding part performance to be evidence of an unknown agreement, the court should have ordered the money laid out to be repaid by way of compensation; for how, said he, does the circumstance of having laid out a great deal of money prove that he is to have a lease for ninety-nine years? The common sense of the thing would have been to let them bring an action for the money (*l*).

Lord Redesdale too expressed his disinclination to carry the cases further than he was compelled by former decisions, adding, that the statute was made for the purpose of preventing perjuries and frauds, and that nothing could be more manifest to any person who had been in the habit of practising in courts of equity, than that the relaxation of that statute had been a ground of much perjury and much fraud (*m*).

Lord Lifford also entertained a similar opinion (*n*).

After a part performance of a parol contract, the testimony of one witness, supported by collateral circumstances, will prevail in favor of a bill for specific execution, against a denial of the agreement by the answer (*o*). But it is otherwise where the alleged agreement, being proved by one witness only, is positively denied by the answer, and that denial is also confirmed by circumstances (*p*).

Notwithstanding an admission of the agreement, the statute may still be insisted on as a defence to the suit (*q*); and

(*i*) *Shannon v. Bradstreet*, sup.
Stiles v. Cowper, 3 Atk. 692.

(*k*) *Blore v. Sutton*, 3 Meriv. 247.

(*l*) *Forster v. Hale*, 3 Ves. 712.

(*m*) *Lindsay v. Lynch*, 2 Scho. & Lef. 1. 5.

(*n*) *Palmer v. White, Wallis*, by *Lynch*, 10. 23.

(*o*) *Pilling v. Armitage*, 12 Ves. 80.
See also *Gregory v. Mighell*, 18 Ves. 328. *Toole v. Medlicott*, 1 Ball & Beat. 393. 402.

(*p*) *Morphett v. Jones*, 1 Swanst. 172; S. C. 1 Wils. 100. *Lindsay v. Lynch*, 2 Scho. & Lef. 1.

(*q*) *Moore v. Edwards*, 4 Ves. 23.

in answer to an objection that the statute could not be pleaded, as there was no danger of perjury, Lord Loughborough, C., observed, that that position had been often controverted, and was not decided: that there was a case in *Atkyns* that misled people, where Lord Hardwicke was stated to have overruled the defence upon the statute, merely on the ground that the agreement was admitted, but that, having himself had occasion to look into it, he found it completely a misstatement, for it appeared by Lord Hardwicke's own notes, that it was upon the agreement having been in fact executed that the case was determined (*r*). Where the statute is pleaded, the defendant's answer must expressly deny the acts alleged as a part performance (*s*).

Where, however, a party admitted a parol agreement for a lease, and his readiness at one time to execute a lease, and his wife, with his knowledge, received fines from the proposed lessee, he was not allowed the benefit of the statute of frauds (*t*) in answer to a bill for a specific performance (*u*).

SECTION III.—OF THE FORM OF THE AGREEMENT, DISTINGUISHING HEREIN AN AGREEMENT FOR A LEASE FROM AN ACTUAL LEASE.

The form of the agreement next claims our attention, which is required to discriminate between language importing an actual lease, and terms which amount to no more than an agreement for one. This distinction, as we shall shortly see, led to so much dispute and inconsistency as to call for a check from parliament; and with this view, the act "to simplify the transfer of property" (*x*) contained a provision (*y*), that no lease in writing of any freehold, copyhold, or leasehold land,

(*r*) 4 Ves. 24.

(*s*) *Bowers v. Cator*, 4 Ves. 91.
Wills v. Stradling, 3 Ves. 378.

(*t*) 7 W. 3. c. 12, the Irish Act, the 2nd section of which is couched in the same language as the 4th section of the

English Act of 29 Car. 2. c. 3.

(*u*) *Hartly v. Wilkinson*, Ridgew. Lap. & Sch. 357.

(*x*) 7 & 8 Vict. c. 76.

(*y*) Sect. 4.

should be valid as a lease unless the same should be made by deed; but that any agreement in writing to let any such land should be valid and take effect as an agreement to execute a lease; and that the person who should be in the possession of the land in pursuance of any agreement to let might, from payment of rent or other circumstances, be construed to be a tenant from year to year. The 13th section, however, declared that the act should commence and take effect from the 31st of December, 1844, and should not extend to any deed, act, or thing, executed or done, or (with an exception relating to contingent remainders) to any estate, right, or interest, created before the 1st of January, 1845.

In the next session (*z*), this act, so far as concerns our subject, was repealed as from the 1st of October, 1845, and it was enacted (*a*), that a lease required by law to be in writing of any tenements or hereditaments made after that day should be void at law unless made by deed.

Hence, instruments in writing made before the 1st of January, 1845, falling within the 13th section, are not affected by the 4th section of the act of 7 & 8 Vict. c. 76; neither are they within 8 & 9 Vict. c. 106, which comprehends only instruments made after the 1st of October, 1845. They must, therefore, be governed by the rules of the old law: and instruments under seal executed after that day must be interpreted in like manner; for though the last act requires a deed for the validity of leases required by law to be in writing, it does not declare that a deed shall not operate as an agreement for a lease. So, again, the old question of lease or agreement may arise on a written contract for a demise for a term not exceeding three years where the rent shall amount to two-thirds of the full improved value, mentioned in the statute of frauds (*b*); as leases of that description are not required by the act of 8 & 9 Vict. c. 106, to be by deed.

There can be no doubt that this act, by rendering a deed necessary to the validity of leases required to be in writing,

(*z*) 8 & 9 Vict. c. 106, entitled "An act to amend the law of real property."

(*a*) Sect. 3.

(*b*) 29 Car. 2. c. 3, ss. 1 and 2.

will crush a mass of difficulty in its birth; but as a multitude of instruments made before the 1st of January, 1845, must yet await judicial construction; and as the question of lease or agreement may still arise on instruments under seal executed after that day, and on written contracts not under seal for a term not exceeding three years, with a reservation of a rent of two-thirds of the full improved value, we must notice the principles heretofore propounded for ascertaining the distinction between the two. Litigation, however, will visibly decrease as existing agreements expire, not to be replaced by others under seal, which in practice are comparatively unknown.

It is observable, that the act of 8 & 9 Vict. c. 106, omitted the provision, "that the person who should be in the possession of the land in pursuance of any agreement to let, might, from payment of rent or other circumstances, be construed to be a tenant from year to year," contained in the act of 7 & 8 Vict. c. 76, as it declared but a mere conclusion of law previously well understood.

With these remarks we proceed to examine the decisions relating to the distinction between leases and agreements, the reader bearing in mind their exclusive applicability to instruments, either parol or under seal, entered into before the passing of the act to simplify the transfer of property (*c*); to instruments under seal executed since; and to mere written contracts for a term not exceeding three years, reserving a rent of two-thirds of the full improved value; as all contracts not under seal for granting leases made after that act, except in the case last mentioned, operate as agreements only.

No particular form of words is necessary to constitute a valid agreement for a lease. The use, however, of ambiguous or untechnical expressions has been, and still may be, a source of perplexity and doubt, whether the instrument be a contract for a lease, executory, and conferring an equitable title only; or an absolute lease, creating an immediate legal estate in possession or reversion. The consequences of the difference claim for it more attention than it appears at first sight to

(*c*) 7 & 8 Vict. c. 76.

deserve. If the instrument amount to a lease, the lessee cannot, during his rightful enjoyment, be evicted in an ejectment; that form of action requiring the plaintiff to be owner of the legal estate (*d*): and, on the other hand, if it operate as an agreement only, it is not competent for the landlord to distrain (*e*), unless a tenancy from year to year be implied from circumstances (*f*). Again, where copyholds form the subject of the transaction, a forfeiture may be incurred or avoided, according to the construction of the instrument; and the amount of the stamp duty, and the denomination of the stamp seem, in like manner, to be dependent on the same question. The variety of these cases has occasioned many apparently discordant adjudications; and, as each was founded on the peculiar phraseology of the instrument, it is difficult to render one subservient to the exposition of another; or to furnish such general principles as may serve to illuminate this obscure labyrinth. The chief rule propounded by the court is, that the instrument must be construed according to the intention of the parties; but we gain little or nothing from it, being still thrown on the particular terms of the agreement to discover what that intention really is.

We will notice, I. the cases which have been held to amount to an agreement; and, II. those that have been held to amount to a lease.

I. The phrase "Memorandum of agreement," "Articles of agreement," "A. B. doth *agree* to let, and C. D. doth *agree* to take," or expressions of similar signification, exercise but little influence in construction; and if the whole instrument import rather an intention to a future act, than a thing done, the words will not be construed to amount to an actual letting or

(*d*) The case of *Weakly* dem. *Yea v. Bucknell*, Cowp. 473, deciding that an agreement for a lease formed a valid defence to an ejectment, it should seem, cannot be supported. See post, Sect. IV. of this Chapter.

(*e*) *Hegan v. Johnson*, 2 Taunt. 148. *Dunk v. Hunter*, 5 Barn. & Ald. 322.

Hamerton v. Stead, 3 Barn. & Cres. 478; S. C. 5 Dow. & Ry. 206. *Knight v. Benett*, or *Bennett*, 3 Bing. 361; S. C. 11 J. B. Mo. 222. *Cox v. Bent*, 5 Bing. 185; S. C. 1 Mo. & Pa. 281. *Regnart v. Porter*, 7 Bing. 451; S. C. 5 Mo. & Pa. 370.

(*f*) *Ibid*.

taking (*g*); though certain terms used, taken by themselves, might imply a present demise (*h*).

In *Goodtitle dem. Estwick v. Way* (*i*), an instrument was produced in evidence, dated in 1779, on paper unstamped, and not under seal, purporting to be articles of agreement between Lord Abingdon and the defendant's father, by which Lord Abingdon, in consideration of a sum of money to be paid by Way, sold him the goods in his house at Rycot. And the subsequent part of the agreement ran thus:—"And further the said Earl of Abingdon doth hereby agree to let, and the said Richard Way agrees to rent and take, for the term of seven, fourteen, or twenty-one years, in case the said earl shall so long live, at and for the rent of 1,400*l.* a year, to be paid half-yearly, (the said earl to pay or allow all manner of tithes and taxes both ordinary and extraordinary,) all his estate, &c., at Rycot. It is agreed, the said Richard Way shall enter upon all the said premises immediately, but not commence payment of rent until Lady-day next. It is further agreed, that leases with the usual covenants shall be made and executed by the parties on or before Michaelmas next"; and the court considered the express stipulation that leases should be drawn before Michaelmas amounted to clear evidence of the intention of the parties that such agreement should not operate as a lease; but only that it should confer a right to the immediate possession till a lease could be drawn, and decided accordingly.

The case of *Doe dem. Jackson v. Ashburner* (*k*) is to the same effect. The articles were as follow:—"March 4th, 1783. Articles of agreement between Thomas Scarisbrick and D. Jackson entered into in regard to his fulling-mills, dry-salt-

(*g*) *Plesaunt v. Higham*, Rol. Ab. Estate, (X), pl. 3. *Tooker v. Squier*, Rol. Ab. Estate, (S), pl. 10; and (X), pl. 2. *Browne v. Warner*, 14 Ves. 159. *Phillips v. Hartley*, 3 Car. & Pa. 121. *Anon. Ow.* 49.

(*h*) *Sturghion v. Painter*, Noy, 128. *Doe dem. Jackson v. Ashburner*, 5 Term Rep. 163. *Morgan dem. Dow-*

ding v. Bissell, 3 Taunt. 64. *Staniforth v. Fox*, 7 Bing. 590-4; S. C. 5 Mo. & Pa. 589.

(*i*) *Goodtitle dem. Estwick v. Way*, 1 Term Rep. 735; and distinguished from *Poole v. Bentley*, 12 East, 170, and post, p. 600.

(*k*) *Doe dem. Jackson v. Ashburner*, 5 Term Rep. 163.

ing-mills, and other conveniences for carrying on said business or trades. That the said mills and conveniences, with the islands and acre of land (*l*) Mintsfeet, called Ashacre, he shall enjoy; and I engage to give him a lease in, for the term of thirty-one years from Whitsuntide, 1784, at the clear yearly rent of 110*l*. to be paid by two equal payments, at Martinmas and Whitsuntide following. And that I will purchase one yard in breadth, to be laid to the race from the High Clews, the length of Charles Close; and if it be bought, and the purchase is more than 200*l*. per acre, he the said D. Jackson to pay more than it costs beyond that rate. And that the old counting-house be brought out as far as the engine-house; and that towards the said alteration, T. Scarisbrick is to furnish timber and slate for the roof. That D. Jackson, on his part, engages to keep the mills, wear, and every other matter in repair, he having at all times the privilege of the roads to make what repairs may be wanted. That he the said T. Scarisbrick engages not to be concerned directly or indirectly in any other mill for manufacturing dyeing woods in Cumberland, Westmoreland, Durham, Northumberland, and Lancashire, or Yorkshire." Here the superadded words were deemed to qualify the term *shall enjoy*, and to restrain its operation so as to make the agreement merely executory. On this ground the case is distinguishable from *Drake v. Munday* (*m*). Had no restraint on the former words been imposed by the engagement to give a lease in future, they would have operated as a perfect lease. Besides, by another part of the agreement, the landlord was to acquire an additional piece of ground to be laid to the mill, without which the lease was not to be granted; and this also was of importance to show that there was to be some future instrument to give a title to the plaintiff. It is also observable, that the agreement was

(*l*) So in report: qu. "at"?

(*m*) Cro. Car. 207; S. C. W. Jo. 231; where A. covenanted, granted, and agreed with B., that he should have and enjoy such a house and lands for

six years, and that A. would sufficiently repair it. *Et in consideration præmissorum*, B. covenanted to pay A. an annual rent of 90*l*. during the six years.

made in March, 1783, and was not to take effect till Whitsuntide, 1784. Under all the circumstances, as the parties had agreed, the one to give, and the other to receive, a future lease, the court could not conceive that this was intended to be a present lease.

So, in another case (*n*), an agreement was entered into in writing in these terms:—"3rd March, 1778. Agreed this day to let Mr. Smith my house, situate in the Wardwicke, Derby, at the yearly rent of thirty guineas, he paying the taxes; also an inclosure called the Gallows Intack, at the yearly rent of 7*l*. The above agreement to continue during my life, supposing it to be occupied by himself, or a tenant agreeable to me. A clause to be added in the lease to give my son a power to take the house for himself, if he chooses, when he comes of age." No other lease was ever prepared, and Smith took possession of and occupied the premises till his death. The court, referring to that part of the agreement which stipulated for a clause to be added in the lease, were decidedly of opinion that those words, importing that something ulterior the agreement was to be done by way of a regular lease, showed the intention of the parties to be that the writing in question should operate only as an agreement for a lease, and not as the lease itself. And on this ground the case was held to be distinguishable from *Poole v. Bentley* (*o*).

The case of *Tempest v. Rawling* (*p*) proceeded on the same ground. The defendant was let into possession, and had paid rent; and to the instrument under which he claimed, an agreement stamp of 16*s*. was affixed. The paper was entitled:—"Conditions of letting the four farms after mentioned," &c. (which were offered in so many lots); and then it proceeded thus:—"The term to be from year to year: the lands to be entered upon on the 3rd of February, 1808, and the housing on the 12th of May"; and six months' notice to quit was to be

(*n*) Doe dem. Bromfield *v.* Smith, B. R. 6 East, 531, n. (*c*).
 6 East, 530; S. C. 2 Smith, 570. Doe (*o*) 12 East, 168; post, p. 600.
 dem. Cawood *v.* Banks, E. 27 Geo. 3. (*p*) *Tempest v. Rawling*, 13 East, 18.

given. Then, after stating certain regulations to be observed by the tenant, it proceeded: "A lease to be made upon these conditions with all usual covenants." And at the foot of the paper was written:—"I agree to take lot 1. [the premises in question] at the rent of &c., subject to the covenants." It was signed by the defendant, and dated the 24th of November, 1807; and the court determined, that it was nothing more than an agreement for a lease which was to be made thereafter, time being given to prepare it, before the term was to commence. They said that in *Poole v. Bentley* (g) the tenant was to have immediate possession, and to lay out money in building, and the rent was to commence immediately; but that here there was no immediate occupation to be taken by the tenant.

In *Bicknell v. Hood* (r), an instrument, dated 13th of December, 1834, was entered into to the following effect:—B., in consideration of the rents, covenants, and agreements, thereafter mentioned, agreed to grant a lease to H. of certain premises; to hold unto H. for the term of two years and three-quarters, wanting seven days, from the 25th of December then instant; yielding and paying the yearly rent of 140*l.*, quarterly, on the 25th of March, &c., the first quarterly payment to be made on the 25th of March, 1835: and which said indenture of lease was to contain covenants by H. to pay the rent at the times above mentioned, and also all taxes, and all other similar covenants contained in a certain lease, dated &c., and made between &c. And H. covenanted and agreed, when requested by B., to accept such lease upon the terms above specified, and to execute a counterpart; and that, until such lease should have been granted, it should be lawful for B. to distrain for all or any part of the rent which might become due from H. for or in respect of the rent of the premises thereby agreed to be demised at any time after the execution of the agreement. It was contended that the clause relative to the right of distress constituted an immediate relation of landlord and tenant between the parties; and, consequently,

(g) 12 East, 168, post, p. 600.

(r) *Bicknell v. Hood*, 5 Mees. & Wel. 104; S. C. 2 Horn & Hurl. 36.

that the instrument operated as a lease, and not as an agreement; an argument met by the remark of Maule, B., that if the instrument operated as a present demise, the clause would be idle, because the lessor would have had power to distrain without it; and the instrument was held to amount to an agreement only.

So, in *Stone v. Rogers* (*s*), “an agreement between B. R. and G. R. (that is to say), G. R. to have my tenement called D., situate at C., for 20*l.* a year, and the whole of my keep and maintenance during the life of G. R., and to take possession immediately, and begin to pay rent at Michaelmas,” was held to amount only to an agreement to grant a future lease for the life of G. R.; for, not being under seal, an estate of freehold could not pass by it.

And where the lessee of a farm entered into a written agreement with his lessor, by which the latter agreed to manage the farm, the former allowing him the sum of 12*s.* a week, and allowing him and his wife to have the use of the dwelling-house and furniture therein free of rent, with power to either party to put an end to the agreement on giving three months’ notice, or paying or receiving three months’ wages; the instrument was held not to operate as a lease, but only as a mode of remunerating the lessor as bailiff (*t*).

In the late case of *Doe dem. Wright v. Smith* (*u*), a party having recovered judgment in ejectment against his tenant, died without having taken possession, and devised the premises to one Elizabeth Taylor, who obtained from the tenant a paper, signed by him, which, after admitting that possession under the ejectment had been stayed at his request, proceeded thus:—“Now know all men by these presents, that, in consideration of the premises, I do hereby attorn tenant to the said E. Taylor, for the said messuages, &c., and have this day paid to F. R., the agent of the said E. Taylor, the sum of one shilling upon the attornment, on account and in part of

(*s*) *Stone v. Rogers*, 2 Mees. & Wel. 443; *S. C. Mur. & Hurl.* 146.

Car. & Pa. 494.

(*u*) *Doe dem. Wright v. Smith*, 8 Adol. & Ell. 255.

(*t*) *Doe dem. Hughes v. Derry*, 9

the rent due and to become due from me for and in respect of the said premises: and I do become tenant thereof to the said E. Taylor from the 29th day of September last past." The writing was produced as an attornment, but the tenant's counsel insisted on its being an agreement for a tenancy, and incapable of being received in evidence for want of a stamp; it was held, however, not to amount to an agreement for a lease, nor strictly to an attornment, attornment to the heir or devisee of a reversion not being necessary, but rather to an acknowledgment of tenancy.

Want of certainty with respect to the commencement and duration of the interest, or the amount of rent, may render the instrument an executory contract. Thus, where A. demised or agreed to demise to H. P. certain lands for the term of three lives, renewable for ever, at a yearly rent; and it was further agreed, that leases should be perfected at the request of either of the parties; the instrument was held to be executory only, it not being the intention to grant a lease for the life of H. P., but for three lives to be thereafter named; and to rest in agreement until proper leases were prepared (*x*).

So, in the case of *Dunk v. Hunter* (*y*), the following agreement was entered into between the parties:—"Memorandum of an agreement between Mrs. Ann Hunter, of Southwick, and David Dunk, of Brighton, Butcher. Mrs. Ann Hunter agrees to let on lease, with purchasing clause, for the term of twenty-one years, all that house and premises, St. James's Street, present tenant, Thomas Lawler, entering on the said premises by D. Dunk, any time on or before the 11th day of February, 1820, at the net clear rent of 63*l.* per year, and to keep all premises in as good repair as when taken to, (reasonable wear allowed,) paying on entry 50*l.* in ready cash, and the rent payable quarterly. The term for seven, fourteen, or twenty-one years, which term Mr. D. Dunk is to give one clear year's notice, before the expiration of either of the above

(*x*) *Pentland v. Stokes*, 2 Ball & Beat. 68.

322, distinguished from *Staniforth v. Fox*, 7 Bing. 590, post, p. 606.

(*y*) *Dunk v. Hunter*, 5 Barn. & Ald.

term of years, if he intends to leave; if purchases before the expiration of the above term by D. Dunk, he is to pay on purchase 1000 guineas." And it was held, that this was only an agreement preparatory to a demise, and not an actual demise: for it did not possess any one of the forms of a lease; nor could the court infer when the tenancy was to commence, or the rent to become due. Holroyd, J., said that the subsequent words relative to the introduction of a clause for purchasing showed that the letting was to be by a particular instrument containing such a clause; and that the stipulation as to the payment of 50*l.* upon entry was quite inconsistent with an actual demise; for, if it were an actual demise, the tenant would have had a right to enter immediately without paying that sum.

And the same principle prevailed in *Clayton v. Burtenshaw* (z). By an instrument under seal, A. agreed with B. to take and hire of him a certain house, shop, and warehouse, at the yearly rent of 35*l.*; but no period was prescribed for the commencement or termination of the interest. It was also agreed that A. should take all the stock in trade, and also all the fixtures and utensils in the shop and warehouse, and such part of the household furniture as he should think necessary, at a fair valuation, on the 11th of October then next; and for the consideration and amount of such stock, utensils, and furniture, he agreed to pay 1000*l.* The deed was executed by A. only, and was impressed with a 30*s.* stamp. The court held, that it operated as an agreement for a lease; for there were no words of demise, the language being that of the persons only who were to have the benefit of the lease; nor did it appear when the interest was to commence; nor how long it was to continue; nor that the supposed lessor executed the instrument.

In *Regnart v. Porter* (a), P. agreed to let, and R. to take, a lease of certain premises, for a term of sixty years from Mid-

(z) *Clayton v. Burtenshaw*, 5 Barn. & Cres. 41; S. C. 7 Dow. & Ry. 300. (a) *Regnart v. Porter*, 7 Bing. 451; S. C. 5 Mo. & Pa. 370.

summer then next, at the rent of 25*l.* a year. P. further agreed to complete the premises for habitation, and to fix a bresummer in the back front window, and to allow R. 15*l.* towards the expenses of an oven, which R. agreed to erect; and the said rent was to commence at Michaelmas day then next ensuing. R. entered, and erected the oven; but P. never completed the premises nor fixed the bresummer. After the expiration of nearly four years, during which period he had never paid any rent, R., being called on for payment, said, that he had the money prepared to pay what was due, but insisted on the previous performance of the stipulations in the agreement, and on the allowance of certain sums he had been compelled to lay out on the premises. It was held, that the instrument did not amount to a present demise; and that P. could not distrain, as no rent certain for the occupation had been agreed on between the parties, nor admitted by the tenant; which latter circumstance was considered as distinguishing the case from *Cox v. Bent* (*b*), where the precise amount of rent was so admitted.

In another case (*c*), J. agreed in writing with B. to make a good and sufficient lease by indenture of all, &c., to B., for the term of twenty-one years, to commence from Michaelmas day then next ensuing, at the yearly rent of 45*l.*, payable quarterly on the four most usual days of payment in every year during the term, the first payment thereof to commence on the 29th September then next; to be entered upon immediately by the plaintiff, he paying upon the day of the date of the agreement 25*l.* to J.: and in the lease were to be contained, on the part of B., a covenant to pay the rent, and all rates, taxes, and assessments, during the term; to repair the premises; to deliver them up quietly at the end of the term; not to assign or underlet without consent; nor to exercise offensive trades; and all other usual and reasonable covenants on the part of B.; and, on the part of J., a covenant for quiet

(*b*) *Cox v. Bent*, 5 Bing. 185, *infra*; S. C. 1 Mo. & Pa. 281.

(*c*) *Brashier v. Jackson*, 6 Mees. & Wel. 549.

enjoyment by B. during the term; and also a power for either of the parties, by notice in writing, to be delivered six months previously to the end or expiration of the first seven or fourteen years, to determine the lease. And B. agreed to accept such lease, and to execute and deliver to J. a counterpart; and it was held to be an agreement only for a future tenancy.

So, if the term be to commence at a future day, and certain matters material to the tenancy remain to be ascertained by a third party, the instrument cannot operate as an immediate demise (*d*). Therefore, where two parties entered into an instrument, dated 29th July, 1829, to the following effect:—“An agreement made between A. and B. about — farm from year to year. He the said A. lets this farm to B. at the valuation of two disinterested persons to be chosen by each of them: B. is to give two sureties to answer for the rent: the above valuation is to take place in determining the rent for 1829 and the time to come;” it was held not to amount to a lease, the rent not being fixed, nor the sureties given. The valuation and giving security were considered as conditions precedent (*e*).

So, an instrument in the following terms:—“A agrees to become the tenant of Glynn Farm at the customary time of entry, under the following conditions; viz., that the sum of 260*l.* annual rent shall be paid at the usual time for the house, premises, and lands, as agreed upon; and B. [the agent of the landlord] agrees to lay out in the improvements and alterations of the farmhouse and new sheds, agreeable to plan and estimate produced, a sum not exceeding 200*l.*, with the understanding that spars for rafters for the outbuildings shall be found from the estate; cartage of all materials, except stones for walls, to be done or found by A.”, was held not to be an immediate demise; but to be an agreement between the parties that at a future time one of them should become the tenant, provided certain things were intermediately done by the land-

(*d*) *Jones v. Reynolds*, 1 Q. B. 506;
S. C. 1 Ga. & Dav. 62.

(*e*) *John v. Jenkins*, 1 Crompt. & Mees. 227; S. C. 3 Tyrw. 170.

lord or his agent, so as to put the premises into a certain state described by the agreement (*f*).

It is observable, that in the cases, noticed hereafter, which establish, as legal demises, instruments wherein something further is agreed to be done, nothing more than a regular conveyance was wanting, the terms of the contract being fully specified and ascertained (*g*).

Strong circumstances of inconvenience apparent on the instrument, and attendant on its construction as a lease, may also indicate the intention of the parties that it should be an agreement only; such as a stipulation, that out of the rent mentioned a proportionate abatement should be made in respect of certain excepted premises, for until the completion of the apportionment the lessor could not distrain; or a stipulation that the tenant should hold at and under all usual covenants as between landlord and tenant where the premises are situate, for it might be disputable what usual covenants were (*h*).

Accordingly, where C. agreed to let, and T. agreed to take, a house situate at Brighton, from the 24th of June then next ensuing, for the term of twenty-one years, determinable at seven and fourteen years; and it was provided, that the lease to be granted should contain a covenant on the part of C. for T. to purchase the fee-simple for 600*l.* at any time within the first seven years of the term to be granted, and a covenant on the part of T. for payment of the rent of 35*l.*, payable quarterly, clear of all deductions for taxes whatsoever, and that the insurance on the sum of 500*l.* was to be paid by C., and to be repaid by T. as an increased rent; to lay out within twelve months 100*l.* on the premises; to keep the premises in substantial repair, and all other usual covenants as in leases of houses at Brighton; and that T. should execute a counter-

(*f*) *Gore v. Lloyd*, 12 Mees. & Wel. 463.

(*g*) *Pentland v. Stokes*, 2 Ball & Beat, 78. *Doe dem. Pearson v. Ries*, 8 Bing. 178, 182.

(*h*) *Morgan dem. Dowding v. Bissell*, 3 Taunt. 65. *Chapman v. Towner*, 6 Mees. & Wel. 100. *Doe dem. Morgan v. Powell*, 8 Scott's N. R. 687. 700.

part of lease when tendered to him by the solicitor of C.; and that the expense of the lease and counterpart should be borne by T.; the instrument was held to amount to an agreement only, and not a lease. The lease, said Alderson, B., is to contain all other usual covenants as in leases of houses in Brighton: now we cannot tell what those usual covenants are. A difficulty arises from the omission to expand the terms of the holding upon the face of the instrument (i).

And, in like manner, where a tenant for life, (the plaintiff,) with power of leasing for any term of years or lives, in possession and not in reversion, not exceeding thirty-one years or three lives, and at the best rent, entered into an agreement, dated 9 February, 1814, whereby he did "set to [the defendant] a certain piece of land, for the term of twenty-one years, or one life, whichever might last longest, at the rate of 5*l.* 13*s.* 9*d.* per acre; to commence tenant the 25th of March then next, and the first payment to be made the 29th of September then next; leases to be perfected at the request of [the plaintiff], and at the costs of [the defendant], with the usual clauses between landlord and tenant;" and on it was endorsed the following memorandum, signed by the parties, "P. M., son of [the defendant], aged about eleven years, is the life named by the said [defendant], as mentioned to be given him by the within agreement;" the instrument was held to be an agreement, and not a lease, as no life was named in the body of it, and the usual clauses were not specified, and as the effect of holding it to be a lease would be to invalidate it as a void execution of the power (k).

The nature of the estate which forms the subject of the contract may likewise serve as a guide to the construction; for example, if lands of copyhold tenure be contracted for alone, or be included in the same instrument, jointly with freeholds. Thus, where copyholds were let by articles of agreement, with promise and covenant to hold for a year, according to

(i) *Chapman v. Towner*, 6 Mees. & Wel. 100.

(k) *Clarke v. Moore*, 1 Jo. & La Tou. 723.

the custom of the manor, and so from year to year, for five years; the court would not allow these words to operate as a lease, lest a forfeiture should be incurred (*l*).

The decision in Lady Montague's case (*m*) is to the same effect; but it is particularly remarkable for the distinction there taken, and confirmed by a modern authority (*n*), between a lease for a year warranted by the custom, and so from year to year during ten years; and a lease for a year according to the custom, and a covenant for the holding of it for a longer time at the will of the lessor: the deed in the former case, operating as a lease for ten years, and consequently working a forfeiture; in the latter, the instrument, after the first year, amounting to a covenant only. But where a copyholder made a lease for a year, excepting the last day, and so from year to year, excepting the last day in every year, as long as he lived, (the lands by the custom not being demisable for a longer period than a year,) the court, without argument, resolved that he had forfeited his estate; for, the term being to continue for two years certain, with the exception of two days, the grant was in effect a lease for more than one year; and the intermission of the day at the end of each year was a mere evasion and immaterial (*o*).

In like manner, one of the grounds of the decision of Doe dem. Coore *v.* Clare (*p*) referred to the lands being of copyhold tenure. The instrument produced was a paper writing, upon an agreement stamp, under hand and seal, and in these terms:—"Be it remembered that it is agreed this 4th of October, 1786, between Thomas Tidd of the one part, and Thomas Clare of the other part: whereas Mary Statham widow is seised of or well entitled unto, &c., [describing the

(*l*) *Lenthall v. Thomas*, 2 Keb. 267. See also *Richards v. Sely*, or *Ceely*, 2 Mod. 79; S. C. 3 Keb. 633.

(*m*) *Lady Montague's case*, Cro. Jac. 301; S. C. nom. *Hamlen v. Hamlen*, 1 Bulstr. 139.

(*n*) *Fenny dem. Eastham v. Child*, 2 Mau. & Selw. 255-8.

(*o*) *Lutterel v. Weston*, Cro. Jac. 308; S. C. 1 Bulstr. 215.

(*p*) *Doe dem. Coore v. Clare*, 2 Term Rep. 739. See also *Doe dem. Nunn v. Luffkin*, 4 East, 221; S. C. 1 Smith, 90; *S. C. Luffkin v. Nunn*, 1 New Rep. 163; 11 Ves. 170.

premises, which were copyhold,] for her life; and the said Thomas Tidd hath agreed with the said T. Clare that in case he shall be seised of or entitled unto the said messuage, &c., on the death of the said Mary Statham, he will immediately on the death of the said Mary Statham demise and let the same to the said T. Clare on the terms and conditions hereafter mentioned: now therefore the said T. Tidd doth hereby agree to demise and let unto the said T. Clare all, &c., and all such copyhold premises as he shall or may be entitled to on the death of the said Mary Statham, at Hendon aforesaid; to hold the same premises unto the said T. Clare, his executors, &c., from and immediately after the death of the said Mary Statham, for the full and whole term of twenty-one years from thence next ensuing and fully to be complete and ended, at and under the yearly rent of 12*l.* 12*s.*, clear of all taxes, (except the land-tax,) payable quarterly, the first payment to be made on the first quarter-day next after the death of the said Mary Statham." After a covenant by Clare to take the premises, to pay the rent, and repair them, &c., during the term, Tidd covenanted that he would, "on the death of the said Mary Statham, and on his becoming entitled to the said premises, procure a license to let the said premises; and that the said T. Clare, his executors, &c., should peaceably and quietly have, hold, occupy, and enjoy, the same for the said term of twenty-one years, without any interruption, &c., of or by the said T. Tidd, or any person or persons claiming or to claim the said premises by, from, or under him." For two reasons the court decided that the instrument constituted an executory agreement only, and not a lease; first, because a different determination would work a forfeiture, contrary to the intention of the parties, who had cautiously guarded against it by the insertion of a covenant to procure the lord's license; and, secondly, because the stamp was conformable to the nature of an agreement for a lease, and not adapted to an absolute lease (*q*).

(*q*) As to the stamp being admitted as evidence of intention, see remarks, post, p. 611.

And the same principle was fully recognized in the succeeding case of *Fenny dem. Eastham v. Child* (*r*). A demise was made of freeholds and copyholds at an entire rent; to hold the freeholds for twenty-one years, and the copyholds for three years, warranted by the custom, with a covenant, (after reciting that the copyholds were not grantable for a longer term than three years successively,) within three months next before the expiration of the said term of three years, under the like covenants, and without any increase of rent, to execute a new lease of the said copyholds for three years, to commence after the expiration of the former term of three years, and so toties quoties until the term of twenty-one years should be expired; and with a covenant for quiet enjoyment, till such new leases should be granted, for the term of twenty-one years. And it was adjudged to operate as a covenant only; for otherwise the lord would have been entitled to enter for a forfeiture; and it was said that the nature of the estate must always help to govern the agreement of the parties concerning it; that a covenant could not have the effect of giving the estate qualities contrary to those which the law had attached upon it; and that this was a covenant for such a lease as might be, and not for such a lease as could not be granted.

Again, if the instrument, by being construed as a lease, would be void, as in the case of a freehold being granted to commence at a future day (*s*); or if, by being construed as a lease, it would be void as a defective execution of a power (*t*); the court will regard it as executory only.

We may add the case of *Doe dem. Morgan v. Powell* (*u*), which was held to amount to an agreement only on eight different grounds, most of them already noticed. The instrument was under hand only, and ran in these terms:—"Feb. 2nd, 1838. A. hereby agrees for himself, his executors and administrators, to let and grant a lease to B. the coal, iron-

(*r*) *Fenny dem. Eastham v. Child*,
2 Mau. & Selw. 255.

(*s*) *Jones dem. Leader v. Duggan*,
1 Jebb & Bourke, 3; S.C. 4 Irish
Law Rep. 86.

(*t*) *Clarke v. Moore*, 1 Jo. & La
Tou. 723, noticed ante, p. 593.

(*u*) *Doe dem. Morgan v. Powell*, 8
Scott's N. R. 687.

mine, stone, and fire clay under C., with all the mines belonging to him in the parish of —, at the following rate, &c., for the term of seventy years from this 2nd day of February ; and that so much royalties as will amount to the sum of 50*l.* a year be worked or paid for during the said term, which rent is to commence in a year from the time a pit is sunk through the four-foot coal ; with power to work the said materials, and to deposit rubbish, and making a wharf, as is usually granted in leases of a similar nature, and by W. T. D. ; nevertheless, if at any time during the said term the said B. should think fit, from the quality of the coal being unsound, or from faults, on giving six months' notice, to abandon and quit the same as if this agreement had never been entered into. And we hereby bind ourselves to commence sinking a pit before the 24th of June next. And the said A. hereby engages that he has not incumbered the said estate, to prevent him from entering into a lease on the above terms and agreement ; which lease is to contain the usual covenants, and as entered into by his brother. The said A. is to be allowed 1*d.* per ton for all minerals brought from other properties through the pits on his land. And the said A. engages to sign a lease upon the said terms as soon as it can be prepared." The court held that this was an agreement, and not a lease, 1st, because it contained no words of actual demise ; 2ndly, because of the provision that A. had not incumbered the estate to prevent his entering into the lease "on the above terms and agreement ;" 3rdly, as the lease was to contain usual covenants, which would render necessary resort to professional advice ; 4thly, because A. agreed to sign a future lease ; 5thly, on account of the absence of a provision that possession should be taken before the execution of a lease ; 6thly, because an easement, such as that for depositing rubbish *in alieno solo*, could only pass by deed ; 7thly, on account of the absence of a certain time for the commencement of the rent, as a pit might never be sunk through the four-foot coal ; and, 8thly, on account of the absence of a stipulation that B. would complete the pit or effectually work the mines.

It seems clear that the parties cannot contemplate an immediate lease, when the party assuming the character of lessor has no power to grant one, as if he himself hold under an agreement for a lease from a superior owner (*v*).

Where the parties expressly declare that the instrument shall operate only as an agreement for a future lease, there is no room for doubt (*x*).

II. We now come to the cases in which the instrument has been held to operate as a lease.

The general rule is, that where the words are in the present tense, or imply a present demise, as, "I demise," or "I agree that A. B. shall hold and enjoy" (*y*); or, "It is agreed that J. H. doth let, &c." (*z*); and are uncontrolled by words of an evidently contrary import, the instrument will operate as a lease (*a*). And where parties sign an agreement containing all the particulars of a demise, it may be considered as imparting a present interest, though it contain only words of agreement to take, and no words of demise by the party signing as landlord; for effect could not be given to the signature, except by implying an agreement to demise, as well as the express agreement by the tenant to take (*b*).

It is clear that the circumstance of denominating the instrument *an agreement* will not constitute it an agreement only, if from its other parts it import to be a lease (*c*); and also that a stipulation for the execution of a future lease, or a

(*v*) *Hayward v. Haswell*, 6 Adol. & Ell. 265; S. C. 1 Wil. Wol. & Dav. 158.

(*x*) *Perring v. Brook*, 7 Car. & Pa. 360; S. C. 1 Mood. & Rob. 510. *Doe dem. Powell v. Morgan*, 8 Scott's N. R. 687. 702.

(*y*) *Anon.* Mo. 8; S. C. Dal. 7; S. C., nom. *Maldon's case*, Cro. Eliz. 33. *Tisdale v. Essex*, Hob. 34; S. C. 1 Rol. 397; Mo. 361; 3 Bulstr. 204; 1 Brownl. & Gold. 23. *Drake v. Munday*, Cro. Car. 207; S. C. W. Jo. 231. *Anon.* Mo. 49. *Whitlock v. Horton*, Cro. Jac. 91; S. C., nom. *Whitlock v. Hartwell*, Mo. 776; S. C. *Whitlock v.*

Chartwell, Noy, 14. 3 Bulstr. 252. *Doe dem. Jackson v. Ashburner*, 5 Term Rep. 167. *Doe dem. Morgan v. Powell*, 8 Scott's N. R. 687. 698-9. But see *Sweeper v. Randal*, Cro. Eliz. 156. *Evans v. Thomas*, Cro. Jac. 172. (*z*) *Harrington v. Wise*, or *Wyes*, Cro. Eliz. 486; S. C. *Noy*, 57; Mo. 459.

(*a*) *Chapman v. Bluck*, 4 Bing. N. C. 187; S. C. 5 Scott, 515; 1 Arn. 27.

(*b*) *Gore v. Lloyd*, 12 Mees. & Wel. 463. 476-9.

(*c*) *John v. Jenkins*, 1 Crompt. & Mees. 227. 233; S. C. 3 Tyrw. 170.

provision that the agreement shall be binding till a lease more fully prepared can be produced, are not incompatible with an intention to grant a present lease (*d*). This seems to have been the law at an early period. One covenanted promised and agreed with another that he should have occupy and enjoy certain lands for seven years, and also covenanted to make as good and perfect demise of the premises, or security for quiet enjoyment, as the tenant's counsel should think fit; and the court clearly held these words sufficient to create a lease; for the terms imported present possession, and the covenant was but *in majorem cautelam*, and for further assurance (*e*).

Several other cases have also been determined on the same subject.

Thus, by the instrument in the case of Baxter d. Abrahall v. Browne (*f*), J. A. and P. L. agreed, "with all convenient speed to grant a lease to the said Browne of, and they did thereby set and let to him, All that, &c. To hold for twenty-one years from Candlemas then next, at the rent of 290*l*. per annum, payable half-yearly to the lessors; with a proviso that the said lease should be void on non-payment of rent, alienation, &c.; and that such lease should contain usual covenants on the part of the lessors and lessee, and certain special ones therein mentioned, in one of which the words "this demise" occur. The same concluded thus:—"As witness the hands of J. A., P. L., and J. B." And it was clearly held to be a good lease *in præsent*i, with an agreement

(*d*) Goodtitle dem. Estwick v. Way, 1 Term Rep. 735. Harrington v. Wise, or Wyes, sup. Poole v. Bentley, 2 Campb. 286; S. C. 12 East, 168. Doe dem. Pearson v. Ries, 8 Bing. 178; S. C. 1 Mo. & Sc. 259. Jones v. Reynolds, 1 Q. B. 506; S. C. 1 Ga. & Dav. 62. Chapman v. Bluck, 4 Bing. N. C. 187; S. C. 5 Scott, 515; 1 Arn. 27. Alderman v. Neate, 4 Mees. & Wel. 704; S. C. 1 Horn & Hurl. 369. Chapman v. Towner, 6 Mees. & Wel. 100. Wilson v. Chisholm, 4 Car. &

Pa. 474. Doe dem. Burne v. Saunders, Fox & Sm. 18. Curling v. Mills, 7 Scott's N. R. 709; S. C. 6 Man. & Gra. 173. Jones dem. Leader v. Duggan, 1 Jebb & Bou. 3. 10; S. C. 4 Irish Law Rep. 86.

(*e*) Tisdale v. Essex, 110b. 34; S. C. 1 Rol. 397; Mo. 861; 3 Bulstr. 204; 1 Brownl. & Gold. 23. Anon. Mo. 8. pl. 31; S. C. Dal. 7; S. C., nom. Maldon's case, Cro. Eliz. 33.

(*f*) Baxter dem. Abrahall v. Browne, 2 W. Blac. 973.

to execute a more formal and perfect lease *in futuro*; the operative words "let and set" being in the present tense, and a reference being made to "this demise." There had been fourteen years' uninterrupted occupation under the instrument, five or six of which had expired since the lessor of the plaintiff's title accrued; and he had accepted rent, and thereby given the defendant every reasonable hope of his acquiescence. Under all these circumstances, the court supported the instrument as a lease.

In *Barry v. Nugent* (*g*), the instrument was in these words:—"Be it remembered that J. Barry hath let and by these presents doth demise, &c., unto R. F., &c., for twenty-one years, to commence the 5th of May, or 1st of November, whichever first happens after the said J. B. recovers the said lands [which were then in litigation] from M. O.; the said R. F. covenanting and agreeing on the foregoing conditions to pay J. B. 110*l.* yearly and every year during the said term, &c.; leases with powers of distress, and clauses for re-entering, and all other clauses usual between landlord and tenant, to be drawn and signed at the request of either party as soon as the said J. B. recovers the said lands from M. O., &c.; and the court were of opinion that the articles operated as a present demise, and that the agreement for a more formal lease was merely in further assurance. Lord Kenyon afterwards (*h*), in commenting on this case, observed, that the words were express and unequivocal, and could have no other meaning than that given to them, namely, that they should operate as words of present demise; they were "hath set and doth demise;" they were positive in themselves; and there was nothing to abridge their meaning.

In *Poole v. Bentley* (*i*), regarded as a leading authority, the memorandum in question, which was in writing upon an agreement stamp, signed by the plaintiff and defendant, and by virtue of which the defendant was let into possession,

(*g*) *Barry v. Nugent*, 3 Dougl. 179, cited, 5 Term Rep. 165.

(*h*) 5 Term Rep. 167.

(*i*) *Poole v. Bentley*, 12 East, 168; S. C. 2 Campb. 286.

appeared to be in the following terms :—"Memorandum of an agreement this 12th of June, 1806, between J. Poole and P. Bentley. The said J. Poole hereby agrees to let unto the said P. Bentley, and the said P. Bentley agrees to take of the said J. Poole, all that piece of land, (describing it,) for the term of sixty-one years from Lady-day next, at the yearly rent of 120*l.*, free and clear of all taxes, &c. ; the said rent to be paid quarterly ; the first quarter's rent within fifteen days after Michaelmas, 1807. And that for and in consideration of a lease to be granted by the said J. Poole, for the said term of years, the said P. Bentley agrees, within the space of four years from 'the date hereof, to expend and lay out, in five or more houses of a third rate or class of building, 2000*l.* ; and the said J. Poole agrees to grant a lease or leases of the said land and premises as soon as the said five houses are covered in ; and the said P. Bentley agrees to take such lease or leases, and to execute a counterpart or counterparts thereof. This agreement to be considered binding till one fully prepared can be produced." Signed by both parties and witnessed. The court concurred in opinion that the intention was, that the tenant who was to expend so much capital upon the premises within the four first years of the term should have a present legal interest in the term, which should be binding upon both parties ; though, when a certain progress should be made in the buildings, a more formal lease, in which perhaps the premises might be more particularly described for the convenience of assigning or underletting, might be executed. And they distinguished the principal case from *Goodtitle dem. Estwick v. Way* (*k*) ; because, in the latter, the exact date of the instrument did not appear, but the stipulation was, that leases with the usual covenants were to be executed before Michaelmas, and the rent which was to be paid half-yearly was not to commence till Lady-day, though the tenant was to be let into possession immediately, which looked to a payment under the leases to be granted ; and the agreement

(*k*) 1 Term Rep. 735 ; ante, p. 583.

also regarded several leases to be executed in future: and from the case of Doe d. Bromfield *v.* Smith (*l*), as the instrument there provided for *a clause to be added to the lease*.

On the authority of Poole *v.* Bentley, the case of Doc dem. Walker *v.* Groves (*m*) was decided. The defendant entered upon the premises at Old Lady-day, 1798. The contract between the parties was in writing, impressed with an agreement stamp only, and ran as follows:—"Agreement made this 7th day of March, 1798, between T. Walker of the one part, and E. Groves of the other. The said T. Walker doth hereby agree to let, and also upon demand to execute unto the said E. Groves a lease of the farm-house, farm-stead, and farm, situate &c., as the same is now in the occupation of the said T. Walker. And the said E. Groves doth hereby agree to take, and upon demand to execute a counterpart of, a lease of the said farm; to hold the same from the 5th of April, 1798, for the term of fifteen years, under the yearly rent of 147*l.*, to be paid half-yearly, on the 5th of April and 10th of October, which said lease is to contain the usual covenants, and an agreement for re-entry in case of non-payment of the rent, or non-performance of covenants; and also the further covenants, &c. That this agreement shall be binding until the said lease is made and executed. And lastly that the said T. Walker shall this present season properly cultivate, and at his own expense sow down ten acres of tillage land, with not less than ten quarters of hay-seed and ten stone of small seeds." The court, considering that the lease was governed by the decision in Poole *v.* Bentley (*n*), decided that the agreement was to operate as a present demise, commencing immediately from the 5th of April; though a more formal lease was afterwards to be granted. And they said that the case of Doc *v.* Ashburner (*o*) was distinguishable; for there the landlord was to acquire an additional piece of ground, without which the lease was not to be granted. Lord Ellenborough, how-

(*l*) 6 East, 530; ante, p. 535.

(*n*) 12 East, 168.

(*m*) Doc dem. Walker *v.* Groves, 15 East, 244.

(*o*) 5 Term Rep. 163; ante, p. 533.

ever, observed, that he should have had considerable doubts, if by the terms of the agreement it had been provided that there should not be an entry till the execution of a lease.

In *Wright v. Trezevant* (*p*) the agreement was in these words:—"Peter Trezevant agrees to pay Francis Wright the sum of one hundred and forty pounds per annum, in quarterly payments, for the house, garden, stables, and coach-house, situated on the rise of Brixton Hill, called No. 1, Frederick-place, for the term of seven, fourteen, or twenty-one years, at his option at the end of every seven years. The rent to commence the 1st of January, 1827." And Best, C. J., said, "I find here expressed sufficient to satisfy all the requisites to a lease: the rent is specified, and the times of payment, and the term determinable at the option of the tenant. I think the parties did intend this to be a lease: the landlord by agreeing to accept the rent, agrees to the equivalent for that rent, in other words consents to demise."

Pinero v. Judson (*q*) was also determined on the authority of *Poole v. Bentley*. The agreement was in these terms:—"Memorandum of agreement between T. W. Pinero of the one part and Charles Judson of the other part. The said T. W. Pinero, for the considerations hereinafter mentioned, agrees to grant, seal, and execute, unto the said Charles Judson a legal and effectual lease of all that messuage &c.; to hold the same unto the said Charles Judson, his executors, administrators, and assigns, from the 25th of March now last past, for the term of five years, at the yearly rent of 80*l.*, to be made payable quarterly, and under and subject to covenants by and on the part of the said Charles Judson, his executors, administrators, and assigns, to pay the said rent in manner aforesaid, to keep the premises in good repair, damage by fire only excepted, and to paint all the outside wood and iron work every third year of the said term. The said lease also

(*p*) *Wright v. Trezevant*, 1 Mood. & Malk. 231; S. C., nom. *Wright v. Trezevant*, 3 Car. & Pa. 441. And see *Copley v. Hepworth*, 12 Mod. 1; and *Chapman v. Bluck*, 4 Bing. N. C.

187; S. C. 5 Scott, 515; 1 Arn. 27.

(*q*) *Pinero v. Judson*, 6 Bing. 206; S. C. 3 J. B. Mo. 497. And see *Doe dem. Green v. Fidler*, 2 Peake's N. P. C. 33.

to contain a covenant by and on the part of the said T. W. Pinero, his executors, administrators, and assigns, for quiet enjoyment upon payment of the said rent and performance of the said covenants. And the said Charles Judson agrees to accept and take the said lease of the said premises aforesaid upon the terms aforesaid, and to execute a counterpart thereof immediately, upon the execution of the lease, and to pay the expense of preparing the said lease. And in the meantime and until such lease shall be made and executed, to pay unto the said T. W. Pinero, his executors, administrators, and assigns, the aforesaid yearly rent or sum of 80*l.* in manner aforesaid, and to hold the same premises subject to the covenants above mentioned. And the said Charles Judson further agrees to put the said premises into good and tenantable repair at his own expense, and to complete all such repairs on or before the 25th day of April now next ensuing." No lease was ever executed. The court, in delivering judgment, said:—We think this instrument must be taken to operate as a lease. It is true the parties contemplate a formal lease in future, and if that were the only stipulation, there might be some difficulty, although it is to be observed, that the term is to begin at once. But when we come to the latter words of the agreement, that until the lease is executed the parties are to stand in the same relation as if it had been executed, there is no longer any room for doubt. The defendants are to hold according to covenants, some of which are inconsistent with a tenancy from year to year, as that to paint once in three years, and that for the tenant's putting the premises in repair before he commences his occupation. These covenants would be unreasonable for a tenant from year to year, but reasonable and usual for a tenant who takes a term. It was no doubt meant that there should be a formal lease, but that the tenant should hold in the meantime under a demise upon the same terms as if that lease had been executed; and it is for his interest that the instrument should receive such a construction because it is attended with greater certainty. Our decision will be conformable with what was laid down by

Lord Ellenborough in *Poole v. Bentley* (*r*), that the intention of the parties, as declared by the words of the instrument, must govern the construction. And he there was led from the covenant to lay out money, to draw an inference like that which we have drawn in the present case from the covenant to paint. The tenant was to do that in the first four years which was inconsistent with a tenancy from year to year.

In *Doe dem. Phillip v. Benjamin* (*s*), a tenant, being in possession under a lease determinable at Michaelmas, 1836, at a yearly rent payable at Michaelmas, entered into a contract with his landlord in the following terms:—"Memorandum made this 13th day of December, 1834, between Jenkin Phillip of the one part, and William Benjamin of the other part. The said J. P. agrees to let the farm of Cevengrich and Tirbach to the said W. B. for the term of fourteen years, determinable at the end of seven years at the option of either party upon giving twelve months' previous notice, at and for the yearly rent or sum of 20*l.*, payable half-yearly, without any deduction whatever: a lease to be drawn upon the usual terms by Mr. Thomas Bishop: and the said William Benjamin agrees to take it upon the said terms. As witness our hands," &c. The court held the instrument to amount to an actual lease, commencing immediately, in extinction of the then existing tenancy; and they considered it no objection to this construction that the landlord would thus lose rent for the current year from Michaelmas to the 13th of December; for though probably the parties did not contemplate all the consequences of their contract, that circumstance could make no difference in point of law.

The other cases referred to in a former note (*t*) are further authorities to show that the introduction into an agreement of words referring to a future lease does not disprove the possibility of a present demise being intended.

Where F., in consideration of the yearly rent of £—, to be

(*r*) 12 East, 168.

Hodg. 97; 1 Per. & Dav. 440.

(*s*) *Doe dem. Phillip v. Benjamin*, 9 Adol. & Ell. 644; S. C. 2 Wil. Wol. &

(*t*) See note (*d*) of p. 599, ante.

paid yearly as after mentioned, agreed to let the premises in question to G. from Michaelmas day then next, upon condition that G. should paint and whitewash them, repair the plaistering, and glaze the windows; and G. agreed to take the premises, and enter on the same, and to paint and whitewash, &c., the instrument was held to be an immediate lease, and not, as argued, founded on a condition precedent that G. should paint, &c. (*u*).

As to *Staniforth v. Fox* (*x*). There the instrument was impressed with an agreement stamp; and ran thus:—"September 11, 1830. An agreement between George Fox and John Staniforth. George Fox does this day agree to let Mr. John Staniforth the whole of his premises situate in Spring Street, Sheffield, for the term of ten years, namely, three cottage houses, one stable, and victualling house, and all other buildings thereto connected; also he does further agree to build a brew-house and make a large cellar under the yard at his own expense, at the yearly rent of 35*l.*, to be paid half-yearly: and that the said George Fox does further agree to pay the ground rent, which is 4*l.* 0*s.* 3*d.* yearly, for the whole of the premises: and that the said George Fox has this day received from the said John Staniforth the sum of 4*l.* in earnest." And it was held, that the words "does *this day* agree to let for the term of ten years" proved that the term was to commence on that day, and therefore that the instrument operated as an immediate demise; the landlord's agreement to build a brew-house, and make a cellar, being considered merely an accessory engagement, and not as part of the original demise, nor tending to defer its commencement to any future day; which distinguished the case from *Dunk v. Hunter* (*y*), where, by express stipulation, the entry was to be at a future day, and to depend upon the lessee's paying down 50*l.*, which if he failed to do, the term might never have commenced.

(*u*) *Doe dem. Green v. Fidler*, 2 S. C. 5 Mo. & Pa. 589.
Peake, 33.

(*y*) 5 Barn. & Ald. 322; ante, p.

(*x*) *Staniforth v. Fox*, 7 Bing. 590; 588.

In the late case of Doe dem. Pearson *v.* Ries (z), which Park, J., said was not distinguishable from Poole *v.* Bentley, by a memorandum of agreement made 21st September, 1829, Knapp agreed to let, and Pearson agreed to take, certain premises for the term of sixty years or thereabouts, being the whole term for which Knapp had the premises leased to him, at the yearly rent of 525*l.*, clear of all taxes, to be paid quarterly on the four most usual days, the first payment to be made for the half quarter at Christmas then next. Pearson also agreed to insure the premises. The lease and counterpart were to be prepared by the attorney of Knapp, at Pearson's expense, and were to contain all the clauses, covenants, and agreements that Knapp had entered into in the lease granted to him; and Pearson was to have the benefit of the insurance which had been lately paid without any charge or expense. At the time of this agreement the premises stood in need of considerable repairs, and Pearson was let into immediate possession to finish them at his own expense. Under these circumstances, it was held, that the instrument was not executory, but conveyed a present interest, principally on the ground of the tenant being put into immediate possession, and having to pay only a half-quarter's rent at Christmas; from which the court inferred that he was to be excused from paying any rent for the half-quarter which he would probably be obliged to devote to repairs, and during which, consequently, he would have no enjoyment of the premises; and of his taking the benefit of the existing insurance, which was conclusive to show an intention to pass an immediate interest.

This decision gives rise to two observations; the first, relating to the propriety of the decision itself; the second, to one of the reasons on which it was founded. In the first place the agreement was for the term of sixty years or thereabouts, *being the whole term for which Knapp had the premises leased to him.* Now, if Pearson were to take the whole of

(z) Doe dem. Pearson *v.* Ries, 8 Bing. 178; S. C. 1 Mo. & Sc. 259.

Knapp's interest, the instrument could not operate as a demise by Knapp; for to constitute a demise, strictly speaking, a reversion must be left in the lessor (*a*); and it is respectfully submitted, that it amounted either to an actual assignment, or to an agreement for an assignment, though it may be asked, how Pearson succeeded in an ejectment when the estate (legal I presume) was outstanding in a mortgagee? In the second place, the court took into consideration the acts of the parties as evidence of their intention. A similar course was taken in the case of *Cooke v. Booth* (*b*); but the reader need only refer to the cases in the note (*c*) to discover with what marked disapprobation that principle of construction has been received by Sir R. P. Arden, M. R.; Lord Thurlow; Mr. Justice Wilson; Sir William Grant; Lord Eldon; and Lord Ellenborough. The particulars will be found in a future chapter (*d*).

In *Hancock v. Caffyn* (*e*), C. agreed with N. that, on payment of 1200*l.*, with interest, by instalments in three years, he would by indenture demise to N., his executors, &c., certain premises, and of which possession had been, or was intended to be, given that day to N.; to hold to him from the day of the date of that agreement for the term of twenty-five years, at the yearly rent of 250*l.*; that in the lease should be contained the like covenants and agreements on the part of N., as were contained on the part of C. in the lease under which he held, and all other usual covenants, &c. N. then covenanted that he would, until the lease should be granted, pay the said rent, and perform the covenants. And it was provided, that, in case at any time before the lease should be granted the rent should be unpaid by the space of fourteen days, it should be lawful for C. to enter and distrain. And the court considered that though the agreement in its main object and purport appeared to be executory, yet, as N. was to

(*a*) See ante, p. 9, *et seq.*

(*b*) Cowp. 819.

(*c*) *Baynham v. Guy's Hospital*, 3 Ves. 298. *Eaton v. Lyon*, 3 Ves. 694. *Moore v. Foley*, 6 Ves. 237. *Iggulden v. May*, 9 Ves. 333; S. C. 7 East,

244-5. See also *Balfour v. Welland*, 16 Ves. 156.

(*d*) See the Chapter on Renewals, post, Part the Fourth, Ch. VII.

(*e*) *Hancock v. Caffyn*, 8 Bing. 358; S. C. 1 Mo. & Sc. 521.

be put into immediate possession, and was to pay rent on certain specified days, it was difficult to say that the mere stipulation of a future lease should defeat the relation which arose upon such a stipulation for payment of rent.

In *Warman v. Faithfull* (*f*), by a memorandum of agreement, made the 28th of November, 1831, J. F. agreed to let to W. W. for a term of seven, fourteen, or twenty-one years, (commencing at Christmas-day, 1831,) at the option of the said W. W., two cottages, &c., at the yearly rent of 24*l.*, payable quarterly, the first payment to be made at Lady-day, 1832. W. W. was to keep the premises in repair, and, on quitting possession, to leave all buildings erected by him during his occupation; and he bound himself to give to J. F. six months' notice, if he should be desirous of putting an end to the agreement at either of the terms before specified. Lastly it was agreed that W. W. should pay all the expenses of preparing a lease for either of the terms above stated. And it was determined that, as the specific rent, and times of payment, and the period of the commencement of the tenancy, were ascertained, the instrument contained everything necessary to a complete and perfect lease.

In *Alderman v. Neate* (*g*), by an instrument dated the 25th of February, 1782, it was agreed in effect as follows:—E. S. doth agree to demise unto A. B., and the said A. B. doth agree to take, all that messuage, &c.; to hold unto the said A. B., from the 25th of March next coming, for the term of ninety-nine years, at the clear yearly rent of 27*l.*, payable half-yearly; and the said A. B. doth agree to pay the said rent accordingly, and all taxes, &c., and to keep the premises in repair; and the parties do agree that a lease and counterpart of the premises shall be prepared and executed on or before the 1st of January next ensuing, with covenants and agreements pursuant to this present contract, and such other general clauses as are usually contained in leases. There was

(*f*) *Warman v. Faithfull*, 5 Barn. & Adol. 1042; S. C. 3 Nev. & Man. 137. (*g*) *Alderman v. Neate*, 4 Mees. & Wel. 704; S. C. 1 Horn & Hurl. 369.

a clause also enabling A. B. to purchase the premises if he should think fit. The court held that it amounted to a lease, as it contained the provisions usually found in actual leases.

Thus we see that in all these cases the terms of the contract were fully ascertained, and nothing more than a regular conveyance was wanting (*h*).

No apology is necessary for the preceding detailed exposition. The peculiarities of the language and provisions of the instruments rendered a particular notice necessary; and closer condensation would only have weakened or obscured their effect. The reader is now enabled by examination to appreciate the merits of the authorities, and to apply them to any case submitted to his consideration.

From a review of the decisions, however, it is apparent, that the circumstance of immediate possession being taken has not of itself materially affected the construction. In *Doe dem. Jackson v. Ashburner* (*i*), indeed, Mr. Justice Ashhurst declared that the permitting of a party to enter was strong evidence to show that the landlord intended to give a present interest; and in the late case of *Doe dem. Pearson v. Ries* (*k*), the judges concurred in that doctrine; but in the majority of the decisions the fact of entry does not seem to have had much weight with the court.

Although an agreement between an intended lessor and lessee may possibly amount at law to a present demise; yet, if, upon the face of it, it appear that a further instrument is necessary to carry the intention of the parties into execution, equity will decree a specific performance of the agreement in that particular (*l*).

Where there is any doubt whether an instrument operates as a lease, or an agreement for one, the prudent course is to

(*h*) *Pentland v. Stokes*, 2 Ball & Beat. 73. And see *Wright v. Trezevant*, or *Trevezant*, 1 Mood. & Malk. 231; S. C. 3 Car. & Pa. 441. *Doe dem. Pearson v. Ries*, 3 Bing. 178, 182; S. C. 1 Mo. & Sc. 259.

(*i*) 5 Term Rep. 168.

(*k*) 3 Bing. 178; S. C. 1 Mo. & Sc. 259. And see also *Doe dem. Morgan*

v. Powell, 3 Scott's N. R. 687, 693-9, where Tindal, C. J., said, that it was important to consider whether the instrument contained words of present demise, and whether possession was actually given at the time.

(*l*) *Fenner v. Hepburn*, 2 Yo. & Col. N. C. V. C. 159.

have it stamped as an agreement and also as a lease; if this be done, only one penalty will be payable (*m*).

But if an instrument stamped with an agreement stamp be relied on at the trial as a lease without objection by the opposite party, the objection cannot afterwards be taken on argument in bane (*n*).

It is not easy to discover on what ground the kind of stamp impressed on the instrument can control its legal operation. The stamp seems to be rather the consequence than the means of construction (*o*). Lord Kenyon, however, considered that it might serve to indicate intention, and regulated his judgment accordingly (*p*).

It remains to observe that as a party entering into possession under an agreement for a lease is liable to eviction, without notice to quit, at least till recognized as a tenant, he should stipulate for enjoyment at all events for a year, although no lease may be executed.



SECTION IV.—OF THE EFFECT AND CONSEQUENCES OF THE AGREEMENT.

I. At law, the mere signing of the agreement does not establish the relation of landlord and tenant, though it creates a right of action at law for damages for a breach of contract, or of suit for a specific performance of it. But the lessee's entry into, and occupation of, the premises in the interval between the agreement and the execution of the lease, unconnected with any transactions from which a tenancy from year to year may be inferred, constitute a tenancy at will (*q*), deter-

(*m*) *Perring v. Brook*, 7 Car. & Pa. 362, n. (*c*).

(*n*) *Doe dem. Phillip v. Benjamin*, 9 Adol. & Ell. 644; S. C. 1 Per. & Dav. 440; 2 Wil. Wol. & Hodg. 97.

(*o*) See *Doe dem. Walker v. Groves*, 15 East, 244. *Clayton v. Burtenshaw*, 5 Barn. & Cres. 41; S. C. 7 Dow. & Ry. 800.

(*p*) *Doe dem. Coore v. Clare*, 2

Term Rep. 744. *Doe dem. Green v. Fidler*, 2 Peake's N. P. C. 33.

(*q*) *Hamerton v. Stead*, 3 Barn. & Cres. 478. 483; S. C. 5 Dow. & Ry. 206. *Regnart v. Porter*, 7 Bing. 451-3; S. C. 5 Mo. & Pa. 370. *Chapman v. Towner*, 6 Mees. & Wel. 100. *Braythwayte v. Hitchcock*, 10 Mees. & Wel. 494-7.

minable without any previous notice to quit (*r*); but convertible, by subsequent payments of rent, into a legal tenancy from year to year (*s*). The tenant will then be considered as holding upon the terms, and subject to the conditions, of the agreement (*t*); and that tenancy can only be determined by the usual notice to quit, or by surrender express (*u*), or implied.

A verbal agreement by a landlord with his tenant holding under a contract for a lease to accept a reduced rent, which is paid accordingly, will not determine the existing tenancy, and create a new tenancy from year to year; but will rather confirm the existing agreement, with a relaxation of one of its terms (*x*).

If the agreement provide that the lease shall contain a proviso for re-entry on breach of any of the covenants stipulated for, the lessee may be ejected on proof of conduct which would amount to a breach if the lease were executed (*y*). In the case of a holding over, the terms of the written agreement would apply; and in principle there is no distinction between that case and the case of a tenant who enters and pays rent upon the faith of an executory agreement for a lease (*z*).

Such holding under the agreement is sufficient to satisfy a count against the tenant as tenant upon a *demise*, for mismanagement of the estate contrary to the terms of the agreement, the count stating that whereas the plaintiff *had demised*, &c. (*a*). Still, some practitioners consider it advisable in all cases to insert a stipulation that, until the lease be executed, the tenant shall hold from a day fixed as tenant from year to year, under the rent, covenants, and provisions, comprised in

(*r*) *Hegan v. Johnson*, 2 Taunt. 148. And see *Knight v. Bennett*, or *Benett*, 11 J. B. Mo. 222; S. C. 3 Bing. 361.

(*s*) *Ibid.* *Hamerton v. Stead*, sup. *Doe dem. Westmoreland*, or *Perfect*, *v. Smith*, 1 Man. & Ry. 137. *Clarke v. Moore*, 1 Jo. & La Tou. 723-9; though, in equity, the tenant is regarded as holding for the whole term according to his agreement.

(*t*) *Doe dem. Oldershaw v. Breach*, 6 Esp. 106. *Hamerton v. Stead*, sup. *Mann v. Lovejoy*, 1 Ry. & Moo. 355.

Doe dem. Thomson v. Amey, 12 Adol. & Ell. 476; S. C. 4 Per. & Dav. 177. *Brydges v. Lewis*, 3 Q. B. 603-8; S. C. 2 Ga. & Dav. 763. *Fisher v. Maguire*, *Armstr. Mac. & Og.* 51.

(*u*) *Chapman v. Towner*, sup. *Braythwayte v. Hitchcock*, sup.

(*x*) *Clarke v. Moore*, 1 Jo. & La Tou. 723.

(*y*) *Doe dem. Thomson v. Amey*, sup.

(*z*) *Ibid.*

(*a*) *Tempest v. Rawling*, 13 East, 18.

the contract ; and this will be admissible as evidence of a parol letting from year to year, where the agreement is not under seal.

Lord Mansfield, whose judicial attachment to equitable doctrines is well known, deemed a contract for a lease equivalent to a lease actually granted ; and decided that, as equity would decree a specific performance, an instrument operating as an agreement only was an available defence to an action of ejectment (*b*) ; but this innovation upon principle has been checked by later decisions (*c*), which have established, on a basis too firm to be easily subverted, that the legal estate must prevail in an ejectment.

An agreement for a lease does not necessarily import that the demise must be made by the party agreeing : it may be construed as a contract to procure a lease to be granted (*d*). Nor is it tantamount to a covenant for title in an absolute conveyance (*e*).

Nor is a party contracting to grant a lease, bound to obtain a release of an outstanding equity of redemption, so as to enable him to be the only demising party ; it is sufficient if he obtain the concurrence in the lease of the owner of the equity of redemption, though the expense of such owner's joining must be borne by the lessor (*f*).

If a party under a contract for a lease for a specified term enter into possession, and hold under it till the end of the term, he may be ejected without notice to quit (*g*).

An agreement for a lease of a house or land does not imply an obligation on the lessor's part, that the premises shall be fit for the purpose designed by the lessee. If, therefore, a party agree to take the eatage of a piece of land for a certain term, at a certain rent, he cannot resist payment, because some of

(*b*) Weakly dem. *Yea v. Bucknell*, Cowp. 473. Goodtitle dem. *Edwards v. Bailey*, Cowp. 597.

(*c*) *Lowther v. Andover*, 1 Bro. C. C. 397. Doe dem. *Hodsdon v. Staple*, 2 Term Rep. 684. Doe dem. *Coore v. Clare*, 2 Term Rep. 739. Goodtitle dem. *Jones v. Jones*, 7 Term Rep. 47.

Doe dem. *Da Costa v. Warton*, 8 Term Rep. 2. *Shannon v. Bradstreet*, 1 Scho. & Lef. 67 ; and see the note there.

(*d*) *Clarke v. Peppin*, 2 Vent. 99.

(*e*) *Gwillim v. Stone*, 3 Taunt. 433.

(*f*) *Reeves v. Gill*, 1 Beav. 375.

(*g*) Doe dem. *Tilt v. Stratton*, 4 Bing. 146 ; S. C. 1 Mo. & Pa. 183.

his animals, with which he stocked it, died from having eaten on the ground something of a poisonous nature (*h*).

It is not usual in practice, on an agreement for a lease, especially where it is to be derived out of a great estate, to require an investigation of the title of the intended lessor (*i*); but whether the production of that title can be enforced on a bill for specific performance by the lessee, has been the subject of anxious discussion.

Some words attributed to Lord Mansfield (*k*) tend to show that that learned judge considered the intended lessee's right unquestionable. "Whoever (said his lordship) wants to be secure when he takes a lease should inquire after and examine the title deeds;" but he admitted, at the same time, that it was not often done, because the tenant relied on the honor of his landlord.

In the case of *Gwillim v. Stone* (*l*), where the plaintiff declared on an agreement by which the defendant agreed to grant him a lease of certain premises, and, after averring that the defendant undertook to procure and deliver to him an abstract of title, (as to which the agreement was in fact silent,) declared as a breach, that the defendant refused to deliver such abstract, Lawrence, J., ridiculed the notion of a mere contract for a lease implying an engagement to furnish an abstract, saying that the alleged agreement to deliver an abstract was all poetry, the mere fancy of the special pleader. And, upon the authority of this determination, Gibbs, C. J., nonsuited the plaintiff in the action of *Temple v. Brown* (*m*), a case similar in its circumstances, and Mr. Justice Heath seems to have approved of the nonsuit; but, upon a motion for a new trial, the court, seeing that the question was one of immense magnitude, at first asked whether the parties would put it on the record in the shape of a special verdict; for

(*h*) *Sutton v. Temple*, 12 Mees. & Wel. 52. *Hart v. Windsor*, 12 Mees. & Wel. 68. *Surplice v. Farnsworth*, 3 Scott's N. R. 307.

(*i*) *Keech v. Hall*, 1 Dougl. 23.

Paton v. Brebner, 1 Bli. P. C. 68.

(*k*) *Keech v. Hall*, sup.

(*l*) *Gwillim v. Stone*, 3 Taunt. 433; S. C. 14 Ves. 128.

(*m*) *Temple v. Brown*, 6 Taunt. 60.

when Lord Chancellor Eldon had said (*n*) that he would not decide the point in equity without the aid of the judges of the courts of law (*o*), they would be sorry to take it on themselves to decide it, without affording an opportunity for a review of their judgment ; but, afterwards, considering that the cause had originated in a dispute between the two attorneys, and that the clients had nothing to gain by the decision of this momentous question, they desired the counsel to consider what course would be most for the interest of the parties, and adjourned, and the case was never afterwards argued.

The question was again agitated, but not settled, in the more recent case of *Fildes v. Hooker* (*p*). The Master of the Rolls (Sir Wm. Grant) declared that he should hesitate long before he decided that an owner of real property, by contracting to grant a lease, became bound to show a title to the estate out of which it was to be granted. It was, however, distinctly determined, that the granting party could not compel a specific performance against the intended lessee, without showing a title to the property to be leased, and that he was able to give what he sought to compel the other to take. The argument attempted to distinguish between an agreement for a lease for only twenty-one years, and at a rack rent, and an agreement providing for a long term, or payment of a large fine, or for expensive improvements ; but the court considered that it might be as great an inconvenience and detriment to a lessee for twenty-one years, as any other lessee, to be evicted in the middle of his term ; and that what, at the commencement of the term, was a lease at rack rent, might from various circumstances become a beneficial term before the end of it ; and, consequently, that a person bargaining for such an interest should not be compelled to take it without a title.

(*n*) *White v. Foljambe*, 11 Ves. 346-7, was referred to.

(*o*) According to Vesey's report, the term, "judges of the courts of law," was not used, Lord Eldon's words being, "But if ever it should be my duty to decide a question so important, I will

not leave mankind to speculate on any judgment I alone can give, but I will have the best assistance upon such a point ; for I can hardly estimate the consequences of law from either doctrine."

(*p*) *Fildes v. Hooker*, 2 Meriv. 424.

We may stop to inquire whether a lessee, or an assignee of a lease, contracting generally to sell the demised property for the residue of the term, is, with regard to the production of the lessor's title, better circumstanced than a party contracting generally to grant a lease.

Lord Eldon cautiously abstained from pronouncing an opinion in two cases (*q*) which touched the point; but in *Purvis v. Rayer* (*r*), L. C. B. Richards, after consultation with what he termed *higher authority* than his own (*s*), evidently with Lord Eldon (*t*), broadly decided that a party contracting for the sale of leasehold property, without any condition respecting the production of the lessor's title, could not enforce a specific performance without such production.

A few years afterwards, Abbott, L. C. J., determined at *Nisi Prius* (*u*), on an agreement for the sale of a lease of a public-house, the agreement being silent as to title, that, without a stipulation for the purpose, a vendor was not bound to produce his landlord's title, a thing (said the learned judge) which in most cases would be utterly impossible. And, after noticing that the cases the other way were only cases in equity, and that although it might be true that a vendor on a bill for a specific performance could not compel a purchaser to take a lease without showing the lessor's title, declared, that still he should hold that, in a court of law, the purchaser could not recover his deposit on account of such title not being produced, unless the vendor had expressly contracted to furnish his lessor's title.

The authority of this case, however, has been destroyed by the more recent decision in *Souter v. Drake* (*x*), where the court of King's Bench, rejecting the distinction acted upon in *George v. Pritchard*, determined, that, unless there be a

(*q*) *White v. Foljambe*, 11 Ves. 377.
Deverell v. Lord Bolton, 18 Ves. 505.

(*r*) *Purvis v. Rayer*, 9 Pri. 438.

(*s*) 9 Pri. 516-7.

(*t*) 5 Barn. & Adol. 999; 3 Nev. & Man. 44.

(*u*) *George v. Pritchard*, 1 Ry. &

Moo. 417.

(*x*) *Souter v. Drake*, 5 Barn. & Adol. 992; S. C. 3 Nev. & Man. 40. See also *Spratt v. Jeffery*, 10 Barn. & Cres. 249. 261, the judgment of Parke, J.

stipulation to the contrary, there is in every contract (*y*) for the sale of a lease an implied undertaking to make out the lessor's title to demise, as well as that of the vendor to the lease itself; that the implied undertaking is available at law as well as in equity; and that the defendant was justified in refusing to part with his money or complete his purchase, until furnished with proof of the lessor's title; and *Souter v. Drake* itself has been fully affirmed of late by the court of Common Pleas (*z*).

But it does not appear that *Souter v. Drake* has impeached the authority of *Gwillim v. Stone*; in adverting to which Lord Denman said (*a*), that the case of *Gwillim v. Stone* was disposed of before the subject was so much considered as it since had been in the cases in equity: besides, that the points actually decided were, first, that on a contract to *grant* a lease there was no engagement necessarily arising by implication of law that the lessor had sufficient power to grant such a lease, and should show a good title, for the court arrested the judgment on the ground that it was not a good breach of an agreement to grant a lease, to state that the defendant had not shown, and had not a sufficient title; and, secondly, that there was no contract implied in point of fact to deliver an abstract of title on an agreement to grant a lease.

The generality of the proposition advanced in *Souter v. Drake* admits of exception in the case of a contract for the sale of a bishop's lease. In the case of *Fane v. Spencer* (*b*), determined by the Vice-Chancellor, July 15, 1815, the defendant, the purchaser of an estate held on lease for lives under the Bishop of Bath and Wells, excepted to the Master's report in favor of the title, on the ground that it was not shown, by the abstract or otherwise, that the bishop had any right to make the lease under which the plaintiff, the vendor, derived her title. There was no condition in the particulars of sale that the purchaser should not require, nor the vendor

(*y*) See, however, *Fane v. Spencer*, *infra*, in this page.

(*z*) *Hall v. Betty*, 5 Scott's N. R. 503; S. C. 4 Man. & Gra. 410.

(*a*) 5 Barn. & Adol. 1000; 3 Nev. & Man. 44.

(*b*) *Fane v. Spencer*, 2 Meriv. 430, n. Sir Thomas Plumer, V. C.

be bound to produce, the title of the ground landlord. The Master, on a reference, reported in favor of the title, and, after several arguments, the V. C. overruled the exceptions, as the case was one of a bishop's lease, and therefore distinct from the question which arose on ordinary leases, the statute prescribing the mode of granting, and the presumption arising from the use of the bishop's seal being equivalent to that which was founded on admission in the case of a copyhold.

On the whole, it appears,

That a party agreeing to grant a lease, without reference to title, cannot compel a specific performance without producing his title ;

That the party agreeing to take the lease cannot enforce the production of that title ;

That a party agreeing, without reference to title, for the sale of his lease, cannot (except in the case of a bishop's lease) compel a specific performance without production of his lessor's title, as well as his own ;

Nor, without such production, maintain an action at law for a breach of the agreement.

It is usual, therefore, in practice, expressly to provide, in agreements for leases, that the lessor shall not be bound to produce his own title ; and, in agreements for the sale of leasehold interests, that the vendor shall not be bound to produce his lessor's title. And if an auctioneer having the management of the sale of leasehold property omit such a provision from the particulars and conditions of sale, he is guilty of gross negligence, which is a good defence to an action by him against his employer for work and labour (*c*).

Where a party having entered into a contract for a lease took possession of the premises, and after perusal of the lease sent him by the lessor, returned it with alterations, it was held that he had waived any right he might have had to an investigation of the lessor's title (*d*).

So, where one contracting for the purchase of the benefit

(*c*) *Denew v. Deverell*, cited by Lord Denman in *Souter v. Drake*, 5 Barn. &

Adol. 1001 ; 3 Nev. & Man. 45.

(*d*) *Warren v. Richardson*, 1 Yo. 1.

of an agreement for a lease of a public house, and also of the stock and good will, entered into possession before the lease had been granted, paid part of the purchase money, and mortgaged his interest, it was held, that he was not entitled to call for the production of the lessor's title, or for evidence that the lease was made in conformity with the power under which it was granted (*e*).

In the absence of express stipulation for the purpose, the lessee has no means, after the execution of the lease, of compelling the lessor to produce his title deeds (*f*). To guard against this objection, the lessee, keeping the probability of an assignment in view, should require from his lessor a covenant for the production of his title, for the satisfaction of a future purchaser (*g*).

If a party contracting to grant a lease to begin at a future specified day, (the agreement being silent as to the time of making the lease,) be not prepared, when called upon, to show that he has sufficient right, the intended lessee may rescind the contract, and recover his deposit, even before the day prescribed for the commencement of the lease in interest (*h*). Or if the intended lessor disable himself from granting a future lease, by concurring in the interval in a conveyance of the estate, inconsistent with the lessee's right, he is guilty of a breach of his contract, and is liable to be sued before the stated day arrives, notwithstanding the possibility of his recovering in the interim the means of fulfilling it. This rule was exemplified in two late cases (*i*). In the former (*k*), the agreement, dated 3rd January, 1824, was, that the defendant should, with all possible speed after he should become possessed of or in possession of a certain public house, execute a lease thereof, from the 21st of December, 1825, for fourteen or twenty-one years, if required by the plaintiff, at the yearly

(*e*) *Haydon v. Bell*, 1 Beav. 337.

(*f*) *Purvis v. Rayer*, 9 Pri. 520.

(*g*) 9 Pri. 521.

(*h*) *Roper v. Coombes*, 6 Barn. & Cres. 534; S. C. 9 Dow. & Ry. 562.

(*i*) *Ford v. Tiley*, 6 Barn. & Cres.

325; S. C. 9 Dow. & Ry. 448. *Roper v. Coombes*, sup. And see *Main's case*, 5 Co. 20, b.; S. C. Mo. 452; Cro. Eliz. 450. 479; Jenk. Cent. 256; 2 And. 18; Poph. 109.

(*k*) *Ford v. Tiley*, sup.

rent of 105*l.*; and the defendant was to have, as the consideration, 5*l.* down, and 100*l.* on the signing of the lease. The agreement also stipulated, that if either party ran from the agreement, or did anything to prevent the lease from being executed by all necessary parties, he should forfeit 200*l.* It appeared in evidence upon the trial, that at the time of the agreement the house was out upon a lease which would not expire till Midsummer, 1827, and that the legal estate was vested in trustees in trust, among other trusts, to receive and pay to Betty Tyler 25*l.* per annum for her life, and, subject thereto, to the use of the defendant, if he attained twenty-four. On the 24th of June, 1825, the defendant, having attained twenty-four, joined with the trustees in a new lease to the former lessees, for twenty-three years, from the 29th of September, 1825; and it was for his concurrence in this lease that the action was brought. It was objected at the trial, and the question was saved, whether the action, brought in 1826, was not premature, on the ground that the lease which was *in esse* at the time of the agreement would not have expired till Midsummer, 1827, and was still as to these parties to be deemed a subsisting lease; but the court were of opinion that the action was maintainable; because by the lease of June, 1825, the defendant had given up his right to have the possession, and had put it out of his power, so long as that lease subsisted, to grant the lease he stipulated to grant; that although it was very true that the defendant might obtain a surrender of the lease of 1825 before Midsummer, 1827, and then he would be in a condition to grant the lease he stipulated to grant, yet the obtaining of such a surrender was not to be expected; and having created a present disability, his contract with the plaintiff was broken by joining in the lease of 1825.

The latter case (*l*) was an action of assumpsit for money had and received. It appeared in evidence, that, on the 31st of March, 1826, the defendant agreed to grant to the plaintiff a lease of a public house, for twenty-one years, from the 29th

(*l*) *Roper v. Coombes*, 6 Barn. & Cres. 534; S. C. 9 Dow. & Ry. 562.

of September then next, in consideration of 1000*l.*, of which 10*l.* were then paid down by the plaintiff; 90*l.* were to be paid on the 13th of April then next; and the residue on having possession. No time for granting the lease was expressly fixed by the agreement. The sum of 90*l.* was not paid on the 13th of April; but on the 20th of that month the plaintiff by his attorney required the defendant to exhibit his title to the premises. The defendant, on the other hand, called for payment of the 90*l.*, and insisted that he was not bound to grant the lease, or show a title, until the 29th of September; and thereupon the plaintiff gave notice that he would rescind the contract, and called for repayment of the 10*l.* The defendant having refused to repay it, an action was commenced in Trinity Term, 1826. It appeared that the defendant had not at that time power to grant a lease according to his contract; and the sole question was, whether the plaintiff at the time when the action was commenced had a right to rescind the contract: if he had not, it followed that the defendant was entitled to maintain an action for the sum of 90*l.*, which was agreed to be paid on the 13th of April: and the court held, that, as no evidence of his right was then given, and as at the trial it was proved, on the contrary, that he had no such right at that time, the plaintiff was entitled to rescind the contract, and to sue for the 10*l.* which he had paid; it being but reasonable that the party should not pay so large a sum as 90*l.* without knowing that the defendant had power to complete his part of the contract.

The tenant should be cautious how he incurs expense in altering or improving the premises before the execution of the lease; as he cannot maintain an action to be reimbursed on the landlord's proving unable to make a good title (*m*).

II. Another of the consequences of the agreement is a right to apply to a court of equity for a specific performance of it; but, to call this branch of equitable jurisdiction into operation, the term and conditions of the intended lease must either be

(*m*) *Gwillim v. Stone*, 3 Taunt. 433.

actually expressed, or the transaction must bear some reference by which they may be ascertained (*n*) ; for if a material ingredient in the terms be omitted, or left in doubt, the court regards the transaction as imperfect, and resting in treaty only. Therefore, where a tenant in possession under an article impeached by his landlord proposed to pay an increased rent, a bill by the landlord for a specific execution of the proposal was dismissed, the period when the increased rent should commence not being agreed on (*o*). It is the same if the agreement make no mention of the term of the proposed lease (*p*).

But though specific performance cannot be decreed of an agreement to sell at a price to be settled by arbitrators, if the arbitrators named by the parties have not made their award; yet, if the agreement be that a valuation shall be made, but the parties have not appointed any persons to make the valuation, the court will itself interfere, by reference to the Master, to ascertain the value, and direct a specific performance of the agreement (*q*).

And where an agreement was entered into for a lease for three lives, or thirty-one years, a specific performance was decreed in Ireland, the term being customary and well understood in that country. It was considered that the right of nomination rested with the tenant; and that he was entitled to the aid of the court, provided he made his application within a reasonable time, and nominated lives in existence when the agreement was entered into (*r*).

The cases of *Wheeler v. D'Esterre* (*s*), and *Lord Kensington v. Phillips* (*t*), being decided on the particular circumstances attending them, were not held to affect the question.

(*n*) *Gordon v. Trevelyan*, 1 Pri. 64.
Verlander v. Codd, 1 Turn. & Russ.
 352. *Priece v. Assheton*, 1 Yo. & Col.
 Exch. 82. 441. And see *Parker v.*
Smith, 1 Col. 608. *Butler v. Powis*, 2
 Col. 156.

(*o*) *Lord Ormond v. Anderson*, 2
Bull & Beat. 363.

(*p*) *Clinan v. Cooke*, 1 Scho. &

Lef. 22.

(*q*) *Daly v. Duggan*, 1 Irish Eq.
 Rep. 311.

(*r*) *Fitzgerald v. Vicars*, 2 Dru. &
 Wal. 298. And see *O'Herlihy v.*
Hedges, 1 Scho. & Lef. 128.

(*s*) *Wheeler v. D'Esterre*, 2 Dow.
 P. C. 359.

(*t*) *Lord Kensington v. Phillips*, 5

But where an agreement uncertain in itself expressly refers to another written instrument (*u*), or to a plan, as an existing document, forming a term in the contract, parol evidence is admissible for the purpose of identifying the writing or plan; though, unless the evidence of identity be clear and satisfactory, specific performance of such an agreement will be refused (*x*).

Cases of part performance appear to receive a more indulgent consideration. Great difficulty sometimes exists in ascertaining the precise stipulations of the agreement, although it be partly carried into execution. Under such circumstances, the court endeavours to collect, if it can, the terms contemplated by the parties (*y*). Thus, where a bill was filed, praying for a lease according to the defendant's promise, the plaintiff having laid out money on the premises; and the defendant insisted on the statute, there being no agreement in writing, nor any certain terms agreed upon, declaring, that what the plaintiff had laid out was not on lasting improvements, but admitting that he had built a stable, which cost him about 10*l.*; and it was proved that the defendant told the plaintiff that his word was as good as his bond, and promised him a lease when he should have renewed his own from his landlord; the Lord Chancellor said, that the defendant was guilty of a fraud, and ought to be punished for it; and so decreed a lease to the plaintiff, though the terms were uncertain; it being in the plaintiff's election for what time he would hold it; and he elected to hold during the defendant's term, at the old rent (*z*).

Lord Thurlow also in a case (*a*), which has not escaped censure (*b*), directed a reference to the Master for the purpose

Dow. P. C. 61. And see *Fenton v. Reilly*, cited, Wallis, by Lyne, 85.

(*u*) *Clinan v. Cooke*, 1 Scho. & Lef. 33.

(*x*) *Hodges v. Horsfall*, 1 Russ. & Myl. 116.

(*y*) *Boardman v. Mostyn*, 6 Ves. 471. See also *Plunket v. Kingsland*, 1 Bro. P. C. 322; and *Parker v. Smith*,

1 Col. 603.

(*z*) 5 Vin. Ab. 523. pl. 40, tit. Contract and Agreement.

(*a*) *Allan v. Bower*, 3 Bro. C. C. 149. And see *Plunket v. Lord Kingsland*, 4 Bro. P. C. 567; S. C. Toml. ed. vol. 1, p. 322; Jour. vol. 27, p. 32.

(*b*) 1 Scho. & Lef. 36.

of ascertaining the terms on which a lease was to be granted to the plaintiff. And in a case that came from Malton in Yorkshire, possession having been delivered in pursuance of a parol agreement, and a dispute arising upon the terms of the agreement, the same learned judge thought proper to send it to the Master, upon the ground of the possession being delivered, to inquire what the agreement was. The Master decided as well as he could, and then the cause came before Lord Rosslyn upon further directions, who certainly seemed to think Lord Thurlow had gone a great way; and either drove them to a compromise, or refused to go on with the decree upon the principle on which it was made (*c*).

So, in *Mortimer v. Orchard* (*d*), where the plaintiff having built a house on the estate of the two defendants brought a bill for specific performance of an agreement, not according to the statute of frauds, for a new lease for twenty-one years; and the terms of granting the lease, proved for the plaintiff by the testimony of a single witness, were different from those of the agreement set up by the bill; and both defendants in their answers stated the agreement to be different both from that proved, and that set up by the bill; Lord Loughborough said that it was impossible to decree upon the prayer of the bill, as then he must decree contrary to the evidence for the plaintiff; that in strictness, therefore, the bill ought to be dismissed; but as there had been an execution of some agreement between the parties, and he gave the plaintiff credit for building the house, which was not compatible with the idea that he was to have only the remainder of the old term, he was put to inquire into the single fact, what was the agreement. The plaintiff having tendered a lease to the defendants, which they had refused, the Master was directed to look into the lease so tendered, and to settle a lease pursuant to the agreement confessed by the answers, to which (said his lordship) I will bind the defendants, and by which only I can

(*c*) Cited by Lord Eldon, 6 Ves. 470.

(*d*) *Mortimer v. Orchard*, 2 Ves. jun.

243. See *Lindsay v. Lynch*, 2 Scho. & Lef. 1.

bind them, containing all the covenants and clauses of the ancient lease.

Lord Redesdale also, in a suit for a specific performance, where the agreement was silent as to the duration of the term, said, that he should have had great difficulty if there had been a part performance; as then he must have directed a further inquiry, for the party had not suggested by his bill that the agreement was for three lives, or for any specific time (*e*).

In conformity also with these determinations, Lord Eldon declared that he considered the court bound to ascertain, as far as possible, the terms of the agreement (*f*). He, however, as well as Lord Rosslyn (*g*), was of opinion that the court had gone quite far enough, and that, perhaps, if it were *res integra*, the soundest rule would be, that if the party left it so uncertain, the agreement should not be taken out of the statute sufficiently to admit of its being enforced (*h*).

In the next place, in seeking a specific performance, the plaintiff must not only come to enforce a fair and reasonable contract, but must show that his own conduct in reference to it has been fair, and free from suspicion (*i*); for if there be a reasonable doubt upon the transaction, the party will be left to his legal remedy for the nonperformance of the contract (*k*).

Thus, where a party acted as if he had abandoned his contract to take a lease, his bill for a specific performance was dismissed (*l*).

So, where the surrender of an existing lease *pur autre vie* formed part of the consideration for the grant of a new term, and in the interval between the commencement of the treaty and the signing of the agreement the life of the *cestui que vie* was despaired of, and shortly afterwards expired, the sup-

(*e*) 1 Scho. & Lef. 40.

(*f*) Boardman *v.* Mostyn, 6 Ves. 471.

(*g*) Ante, p. 624.

(*h*) Boardman *v.* Mostyn, *sup.*

(*i*) Flood *v.* Finlay, 2 Ball & Beat.

16. O'Rourke *v.* Percival, 2 Ball & Beat. 58. Garrett *v.* The Earl of Bes-

borough, 2 Dru. & Wal. 441. Harris *v.* Kemble, 1 Sim. 111; S. C. 2 Dow & Cla. 463.

(*k*) Flood *v.* Finlay, *sup.* O'Rourke *v.* Percival, *sup.*

(*l*) Garrett *v.* The Earl of Besborough, *sup.*

pression of the fact of his danger, which was known to the lessee, but not to the lessor, was deemed too sharp a practice to be countenanced in equity, and the plaintiff's bill for a specific performance was dismissed with costs (*m*).

So, where a party in possession of land as assignee and ostensible owner, but in fact holding under a secret trust for the original lessee, then in insolvent circumstances, obtained from the landlord, in confidence of his (the assignee's) being the rightful tenant, and a responsible man, an agreement for a renewal of the lease, the court for his misconduct dismissed his bill for a specific performance (*n*).

To the same effect was the case of *Blakeney v. Baggott* (*o*). F. C., being tenant for life of the lands in question, with power to lease for thirty-one years, with remainder to M. C., his son, in tail, made a lease to O., his attorney, for three lives, of which M. C. was one. M. C., while an improvident young man, executed an agreement, written on the counter-part of the lease in the hands of O., by which, in consideration of 20*l*., he confirmed the lease granted by his father, and engaged to renew it for an additional three lives. The agreement was dated in 1749; and the first three lives expired in 1817; and then the representative of O. claimed a renewal for other three lives, pursuant to the agreement, and filed his bill for specific performance; but it was dismissed, for the agreement was deemed to be of too doubtful and suspicious a character for a specific performance; and the time which had elapsed was not considered under the circumstances to imply acquiescence; and the judgment was affirmed in the House of Lords.

Again, the court will not compel the acceptance of a lease, unless the party seeking the specific performance be able to perform the contract on his part, by granting a secure lease for the term agreed for; therefore, an underlessee of one of

(*m*) *Ellard v. Lord Llandaff*, 1 Ball & Beat. 241.

(*n*) *O'Herlihy v. Hedges*, 1 Scho. & Lef. 123, 130.

(*o*) *Blakeney v. Baggott*, 1 Dow. & Cla. 405; S. C. 3 Bli. P. C. N. S. 237.

Dowling v. Mill, 1 Madd. 541.

several houses which had been originally comprised in one demise, with a right of re-entry into the whole on breach of covenants, agreeing to grant to another a lease for twenty-one years, cannot compel a specific performance, as he cannot secure to the purchaser the specific property for which he contracted; for if the covenants in the original lease, though well observed with respect to the particular house, were to be broken as to any of the other houses, the original lessors would be entitled to re-enter upon the whole of the premises. The offer of pecuniary compensation in case of eviction will not alter the case, as such indemnity cannot extend to the specific subject of the contract, the possession and occupation of the premises (*p*).

On the other hand, where a person contracts to grant a lease of an estate, and it afterwards turns out that he is not entitled to a part of it, the contract may generally be enforced by the lessee as to the part of which the grantor is owner (*q*). The rule, however, does not obtain where unfair dealing has been practised; and, hence, where the plaintiff, aware that the defendant, a tenant for life, had only a limited power of leasing, contracted for a lease which would have been a fraud on the settlement, and by his amended bill prayed that the agreement might be carried into execution so far as the defendant had power, without prejudice to the persons in remainder, the court, considering the agreement a violation of the leasing power, rejected the application, although the plaintiff was capable of maintaining an action at law for the loss of his bargain, and expressed his willingness to take a lease determinable on the death of the grantor (*r*).

Nor will equity lend its assistance to enforce an agreement or contract by a person out of possession to grant a present lease to a party who is apprised that he cannot obtain possession except by a suit, it not being competent to any person

(*p*) *Fildes v. Hooker*, 2 Meriv. 424; Beat. 64.

S. C. 3 Madd. 193. *Warren v. Richardson*, 1 Yo. 1.

(*q*) *O'Rourke v. Percival*, 2 Ball &

(*r*) 2 Ball & Beat. 58. See also *Ellard v. Lord Llandaff*, 1 Ball & Beat. 241.

to deal on such terms, the contract being an actual dealing for a suit in chancery, and the situation of the property, by suppressing competition, depriving the owner of getting the fair value for it (*s*).

After the dismissal of a bill for the specific execution of an agreement, the plaintiff being unable to make a good title, an injunction may be obtained on motion to restrain him from proceeding at law on the agreement, the defendant undertaking to file a bill for an injunction forthwith. Actions under these circumstances are discountenanced by the court of Chancery, as they appear to be an attempt to induce a jury to act contrary to the Master (*t*).

Some consideration also must move from the party seeking a specific performance. Therefore, where a lessee obtained from his lessor a document by which she agreed to abate the rent 50*l.* a year, in consequence of representations to her that he had expended large sums of money in improving the premises, it was held that it did not amount to a contract by him to surrender his old lease, or by her to grant a new one, and that as it was wholly without consideration, nothing being to be performed by the tenant, he could not enforce a specific performance of it, although the reduced rent had been paid and accepted for more than seven years (*u*).

In all cases the plaintiff is expected to exercise due diligence and activity in enforcing his claim. A bill for the specific performance of an agreement to grant a lease, being an application to the discretion, or rather to the extraordinary jurisdiction of the court, cannot be entertained in favor of a person who has long slept upon his rights, and acquiesced in a title and possession adverse to his claim (*x*). In one instance, where the plaintiff had refrained from filing his bill until two years after the treaty had been broken off by the defendant's declining to perform the contract, and the only

(*s*) Bayly *v.* Tyrrell, 2 Ball & Beat. 358.

(*t*) *Mc Namara v. Arthur*, 2 Ball & Beat. 349.

(*u*) *Fitzgerald v. Lord Portarling-*

ton, Jones, Irish Exch., 431. See also *Parker v. Smith*, 1 Col. 608.

(*x*) *Moore v. Blake*, 1 Ball & Beat. 62. And see *Hudson v. Bartram*, 3 Madd. 440.

reason assigned for the delay being, that the plaintiff's attorney had mislaid the papers relating to the transaction, the court refused a specific performance (*y*). Whether the laches consist in not prosecuting, or not commencing a suit, is immaterial (*z*).

The doctrine of laches does not apply to a contract in fact executed, by the parties having been in enjoyment of the benefits given them by the contract (*a*).

As a general rule, an assignee of an agreement for a lease is entitled to a specific performance in his favor; but not unless he can procure, if the lessor require it, the assignor's personal liability for the covenants (*b*).

Until lately, it was doubtful whether specific performance of a contract for a lease entered into with a party prior to his bankruptcy could be enforced by his assignees; though the inclination of the court for a length of time was evidently unfavorable to their claim.

The case of *Drake v. the Mayor of Exon* (*c*) arose on a covenant to grant a renewal; but it is apprehended that the same rules would apply to a contract for an original lease. The lessee became bankrupt, and the bill was filed by the assignee of the commissioners; and Windham, J., and Turner, B., to whom the case was referred, certified that the plaintiff ought not to be relieved.

Willingham v. Joyce (*d*) involved circumstances of fraud and misrepresentation, as well as of insolvency; but Lord Alvanley, then Master of the Rolls, seemed clearly of opinion that assignees could not maintain a bill for a specific performance, unless they chose to take the lease as tenants, and enter into covenants. And shortly afterwards Lord Loughborough

(*y*) *Heaphy v. Hill*, 2 Sim. & Stu. 29.

(*z*) *Moore v. Blake*, 1 Ball & Beat. 69.

(*a*) *Clarke v. Moore*, 1 Jo. & La Tou. 723.

(*b*) *Dowell v. Dew*, 1 Yo. & Col. V. C. 345. 358.

(*c*) *Drake v. The Mayor of Exon*, 1 Ch. Ca. 71; S. C. Freem. Ch. 183; 1 Eq. Ca. Ab. 53. pl. 1. Nels. Ch. Rep. 102. *Vandenanker v. Desbrough*, 2 Vern. 96; S. C. 1 Eq. Ca. Ab. 53. pl. 3. *Moyses v. Little*, 2 Vern. 194; S. C. 1 Eq. Ca. Ab. 53. pl. 4.

(*d*) *Willingham v. Joyce*, 3 Ves. 168.

declared (*e*), that it must be a very strong case that would induce him to carry into execution an agreement between landlord and tenant, the estate not being executed at law, where the person who was to become the tenant had become a bankrupt; and his lordship said, that the court must certainly, upon the circumstance of the intervening bankruptcy, do a great deal more, in respect of the defendant, than merely decree a specific performance; but he declined stating, as a general proposition, that bankruptcy discharged the contract.

The same opinion appears to have been entertained by Lord Redesdale, though the case before him (*f*) was distinguished by the circumstance of the bill being filed by a party claiming beneficially under a secret trust created in his favor by the person to whom the landlord, in ignorance of that fact, had contracted to grant the lease.

Flood *v.* Finlay (*g*), before Lord Manners, was determined against the assignees, on the ground of the contract being entered into with a view to the personal accommodation of the bankrupt; and it was, therefore, thought unnecessary under the circumstances to decide the abstract question, whether they could not in any case be entitled to a decree for a specific performance.

Sir William Grant, with greater freedom, expressed an opinion that the difficulty of establishing the assignees' right to a specific performance would be insurmountable (*h*).

The right of the assignees to the benefit of a contract for a lease entered into with the bankrupt appears for the first time to be recognised by the bankrupt act of 49 Geo. 3 (*i*), the 19th section of which provided, "that in all cases in which a commission of bankrupt should be sued forth against any person after the passing of the act, and such person should be entitled to any lease, or *agreement for a lease*, and the assignees should

(*e*) Brooke *v.* Hewitt, 3 Ves. 253-4.

(*f*) O'Hertilly *v.* Hedges, 1 Scho. & Lef. 123, 130. And see Featherstonhaugh *v.* Fenwick, 17 Ves. 313.

(*g*) Flood *v.* Finlay, 2 Ball & Beat. 9;

S. C. abridged, 2 Rose, 147.

(*h*) Weatherall *v.* Geering, 12 Ves. 513.

(*i*) 49 Geo. 3, c. 121.

accept the same, as part of the bankrupt's estate and effects (*k*), the bankrupt should not be liable to pay the rent accruing due after such acceptance; and that after such acceptance the bankrupt should not be liable to be sued in respect of any subsequent non-observance of the conditions, covenants, or agreements, therein contained; provided that it should be lawful for the lessor, or person *agreeing* to make such lease, if the assignees should decline, upon being required, to determine whether they would or would not so accept such lease, or *agreement for a lease*, to apply by petition to the court, praying that they might either accept the same, or deliver up the lease, or *agreement for the lease*, and the possession of the premises demised, or intended to be demised, which should thereupon make such order as should seem meet.

A few years after this act was passed, Lord Eldon tacitly admitted the right of the assignees to a specific performance. A petition was presented, that the assignees of a bankrupt might elect to take or reject an agreement for a lease, entered into with the bankrupt. It was merely a parol agreement, strengthened, however, by divers acts of part performance. And his lordship was of opinion, that a parol agreement, although brought within the principle upon which a court of equity would decree a specific performance upon acts of part performance, was not an agreement within the intent of the 49 Geo. 3. c. 121. s. 19 (*l*). Hence we may infer, that, had the agreement duly complied with the requisites of the statute of frauds, he would not have refused the petition. And in a later case before Sir Thomas Plumer (*m*), the assignees of a bankrupt were decreed to be entitled to the benefit of a contract for a lease entered into with him, without any objection being raised to their claiming in that capacity.

A clause similar to the above is preserved in the bankrupt act of Geo. 4 (*n*); and in the recent act (*o*) to amend the law

(*k*) Whether this right of election has not been affected by the act to establish a court in bankruptcy, 1 & 2 W. 4. c. 56, will be discussed hereafter, Vol. 2, Part the Sixth, Ch. V.

(*l*) Ex parte Sutton; in the matter of Changeur, 2 Rose, 86.

(*m*) Meux v. Maltby, 2 Swanst. 277.

(*n*) 6 Geo. 4. c. 16. s. 75.

(*o*) 7 & 8 Vict. c. 96. s. 12.

of insolvency, bankruptcy, and execution; and it has been decided (*p*), that a specific performance will be decreed on a bill by the assignees, provided they will personally enter into the covenants into which the bankrupt must have entered if he had been the lessee. The reasons for this determination lie in a narrow compass. *Primâ facie*, all the rights of a bankrupt are transferred to the assignees: one of those rights is a title to a specific performance; and that right is not weakened upon the subject of a lease by the clause in the bankrupt act before alluded to. Indeed, the court considered this to be the very case for which the 75th section of that statute had provided. It put the assignees to elect whether they would accept the benefit of the agreement, or decline it. If they might elect, and should decide upon accepting the benefit, they must be entitled to it on making that election; unless a decree for a specific performance would work a hardship or injustice to the lessor. Sir Wm. Grant's opinion above noticed (*q*) was allowed to create some difficulty; but, being deemed a mere obiter opinion, and not called for by the case then before his Honor, was not received as authority by the court of Exchequer. That opinion, however, seems capable of reconciliation with the judgment in the case of *Powell v. Lloyd*, by referring the latter to its true ground. It was founded on the section of the bankrupt act which gave the assignees the option of accepting or repudiating the agreement; but as no such statute law existed when the case of *Weatherall v. Geering* was before Sir Wm. Grant, the inconsistency at first sight apparent between the cases is removed.

Where both the intended lessor and intended lessee become bankrupt, it seems that the court of Review has no jurisdiction to compel a specific performance in favor of the assignees of the latter, on their electing to adopt the agreement (*r*).

(*p*) *Powell v. Lloyd*, 2 Yo. & Jerv. 372; S. C. in an earlier stage, 1 Yo. & Jerv. 427. And see *Willingham v. Joyce*, 3 Ves. 69. *Crosbie v. Tooke*, 1 Myl. & Keen, 431. *Morgan v. Rhodes*, 1 Myl. & Keen, 435; S. C. 1 Mont. &

Ayr. 214. *Page v. Broom*, 3 Beav. 36.

(*q*) Sup. p. 630.

(*r*) *Ex parte Lucas, Mre Oldham and Edge*, 3 Deac. & Chit. 144; S. C. 1 Mont. & Ayr. 93.

In the case of *Smith v. Phillips* (s), one Holman made an equitable mortgage of the premises to the defendant, and afterwards entered into an agreement to grant a lease of the same premises to the plaintiff. Holman became a bankrupt; the property was sold under an order of the court of Review, made on the petition of the defendant, the equitable mortgagee. The defendant himself became the purchaser, and received or retained out of the purchase money the sum secured by his equitable mortgage. The premises were sold subject to the plaintiff's claim under the agreement, and the assignment expressly recited that they were so sold. And the plaintiff was held to have a clear right to the lease which he contracted for; and it was said that that right was to be worked out against the equity of redemption, which, having been united to the equitable mortgage, could not be separated.

As the acts for relief of insolvent debtors (t) contain a like power for the assignees to adopt or reject the insolvent's leases, or agreements for leases, it follows that they must stand, with reference to specific performance, in the same situation as the assignees of a bankrupt.

Still there is a difficulty where the person seeking a specific execution of a contract for a lease is notoriously insolvent, but has neither been declared a bankrupt, nor has taken the benefit of the insolvent act. Nor is it capable of solution by reference to the practice of the court on a bill by an insolvent person for the completion of an agreement for an absolute purchase. Between purchases and leases there is a marked distinction (u). In the former, the bill tenders payment of the purchase money, and thus relieves the vendor from future risk; but, in the latter, the responsibility and solvency of the tenant are matters of important interest to the landlord during the continuance of the whole term. The question has frequently been presented to the notice of the court, but almost all the cases in which it has arisen have been deter-

(s) *Smith v. Phillips*, 1 Keen, 694. c. 96, s. 12.

(t) 7 Geo. 4. c. 57, s. 23; 1 & 2

(u) *Buckland v. Hall*, 8 Ves. 94.

Viet, c. 110. s. 50; and 7 & 8 Viet.

mined on collateral points. It is evident, however, from the authorities before cited (*x*), that such an application by an insolvent would not be regarded with a very favorable eye. This was the impression of Lord Eldon, who, in *Buckland v. Hall* (*y*), after premising that every man taking a tenant looked to the probability of his rent being paid through the whole currency of the lease, continued:—"Therefore, insolvency admitted, and not cleared away, is a weighty objection to a specific performance of an agreement for a lease; the party here seeking an execution beyond the law. Insolvency would be of weight with a jury. Such a question appears never to have been determined; and is of too much consequence to be decided upon motion. I shall, therefore, only say, that, at the hearing, in general cases, it would have considerable weight with me; in some cases more than in others. If the tenant undertakes for nothing but the payment of rent, it must be appreciated accordingly; if, beyond that, he undertakes for considerable expenditure upon the premises, before he is to be placed in the relation of lessee, that is directly connected, as a most important circumstance, with the fact of solvency or insolvency. Therefore, where very considerable repairs are to be done by the lessee, his solvency is to be looked to to that extent; for unless done before the bill is filed, they are to be done after the decree; not immediately upon tender, as in the case of a purchase, unless the bill can offer an amount of the utmost possible repairs to be paid into court." In a later case (*z*), where a bill was filed for a specific performance, Lord Eldon overruled a plea that the plaintiff was discharged under the insolvent act, 49 Geo. 3, c. 115; as that circumstance did not exist when the bill was filed. The consequence was, that the assignee under the act, clerk of the peace, or assignee, was obliged to come in by a supplemental suit.

(*x*) *Willingham v. Joyec*, 3 Ves. 168.
Brooke v. Hewitt, 3 Ves. 253. *O'Herrily v. Hedges*, 1 Scho. & Lef. 123.
And see *Boardman v. Mostyn*, 6 Ves. 467.

(*y*) *Buckland v. Hall*, 8 Ves. 92. 95.
See also *Powell v. Lloyd*, 2 Yo. & Jerv. 379.

(*z*) *De Minekwitz v. Udney*, 16 Ves. 466.

But at last it has been determined, that the insolvency of the intended lessee is a good ground of defence to a bill brought by him for a specific performance (*a*). The insolvency, however, must be proved in some satisfactory manner. It is not necessary that the party should be proved to have taken the benefit of the Insolvent Debtor's Act, or that he should have given up all his property for the benefit of his creditors; but there must be such proof of general insolvency as the court can act upon, and as judges upon great consideration have deemed sufficient to indicate that state of circumstances (*b*). In the case in question, the plaintiff had made compositions with his creditors in the years 1822 and 1826, and, previously to the agreement, dated 25 June, 1833, had quitted the house he had previously occupied, having prevailed upon his landlord to accept a composition of 60*l*. for an arrear of rent, amounting to 81*l*. 5*s*. then due to him, of which sum of 60*l*., 10*l*. only had been paid, and that by the plaintiff's brother. On the other hand, there was the evidence of three persons of unimpeachable character, one of whom had been a surety for the plaintiff to the amount of 1000*l*. since the year 1833, who spoke to their having had dealings with him for many years, and to their opinion of his responsibility; and under the circumstances the Master of the Rolls did not think that there was such evidence of general insolvency as could induce him to say that the plaintiff was not in a situation to perform the covenants contained in the lease. As to the compositions which he had made with his creditors in 1822 and 1826, his lordship did not think that he ought to advert to them. How he asked could those circumstances be material, if he had conducted himself properly since that time?

It appears that the intended lessor has a right to make any statement in his answer tending to show misrepresentation on the part of the plaintiff, the intended lessee, as to his circumstances and respectability: he has a right to aver his

(*a*) *Price v. Assheton*, 1 *Yo. & Col. Exch.* 82, 441.

(*b*) *Neale v. Mackenzie*, 1 *Keen*, 474.

general insolvency, and to put in issue any facts which may prove such insolvency; but he has no right to introduce mere imputations on his moral character (*c*).

It is no defence to a bill filed against a landlord by a person to whom the benefit of the agreement has been assigned, that the party with whom it was originally made has become bankrupt or insolvent: provided the assignee be solvent, and in a condition to enter into the usual covenants; and there be no evidence that the contract was entered into upon considerations personal to the assignor (*d*).

A specific performance will not be decreed in favor of a person whose conduct would have effected a breach of the covenants, and conferred on the lessor a right of re-entry, had the lease been granted to him before (*e*), except perhaps in cases where the court would relieve against a forfeiture for the breach, on the principle of compensation (*f*); nor at the suit of one who contracts for a lease, or renewal of a lease, ostensibly for his own benefit, but in fact under a secret trust for another, whom the landlord would not have accepted as tenant (*g*); nor of the cestui que trust (*h*); and still less at the instance of a felon (*i*).

But where one agreed to let to another certain premises, provided the intended lessee, his executors, administrators, or assigns, should request the same for the special purpose only of carrying on his or their trade, or for the special purpose of residence, the court held that a mere covenant by the lessee, if he could, to let a stranger have the premises, did not take away his right to a specific performance (*k*).

(*c*) *Pearson v. Knapp*, 1 Myl. & Keen, 312.

(*d*) *Crosbie v. Tooke*, 1 Myl. & Keen, 431. *Morgan v. Rhodes*, 1 Myl. & Keen, 435; S. C. 1 Mont. & Ayr. 214.

(*e*) *Boardman v. Mostyn*, 6 Ves. 472. *Buckland v. Hall*, 8 Ves. 95. *Jones v. Jones*, 12 Ves. 183. *Weatherall v. Geering*, 12 Ves. 511. *Hill v. Barclay*, 13 Ves. 63. *Attwood v. Barham*, 2 Russ. 136. *Thompson v. Guyon*, 5 Sim. 65. *Dowell v. Dew*, 1 Yo. & Col.

V. C. 345. 363. *Tunno v. Lewis*, 2 Legal Observer, 363, Rolls, 10 June, 1831.

(*f*) *Gourlay v. The Duke of Somerset*, 1 Ves. & B. 68. *Lovat v. Lord Ranelagh*, 3 Ves. & B. 29. *Dowell v. Dew*, 1 Yo. & Col. V. C. 345. See post, Part the Seventh, Ch. 1. as to this doctrine.

(*g*) *O'Herlihy v. Hedges*, 1 Scho. & Lef. 123; cited, 17 Ves. 313.

(*h*) *Ibid.*

(*i*) *Willingham v. Joyce*, 3 Ves. 169.

(*k*) *Williams v. Cheney*, 3 Ves. 59.

In like manner, the mere refusal by a tenant to execute the counterpart of a lease when tendered, will not prejudice his future application for a specific performance, unless the refusal amount to an absolute renunciation and abandonment of the contract: a declaration that he thinks the agreement is as good a lease as he can have, does not import that he will never execute a lease; nor can it be construed as a repudiation of an agreement with which he expresses himself satisfied (*l*).

Whether the court will in any case direct an actual execution of a lease after the term has expired, to enable the lessor to recover damages at law for a breach of covenant, is still open to discussion. Sir Wm. Grant seems to have been satisfied that the determination of the term intended to be granted by the lease would preclude the plaintiff from equitable aid. But where an application was made to have a cause advanced in the paper of causes, on the ground that the term of years would expire before the suit, which was for a specific performance, could come on to be heard in its regular course, in which case the decree which was sought could not be made against the defendant, the cause was advanced accordingly, the plaintiff undertaking to give due notice to the defendant of its being so advanced. An application being afterwards made by the defendant to have the cause replaced where it originally stood, as it had been advanced without previous notice to him, Sir Wm. Grant said, that a defendant had no right to object to a cause being heard at any time after it had been set down for hearing, it being in the discretion of the court to direct a cause to be advanced on sufficient allegation; and that, in the present instance, it had appeared to him that, for the sake of complete justice, the cause ought to be so advanced (*m*). Judging, however, from the remarks of Sir Thomas Plumer, M. R., it appears probable that in a case of important rights, and losses

(*l*) *Gourlay v. The Duke of Somerset*, 1 Ves. & B. 68; S. C. 19 Ves. 429.

(*m*) *Hoyle v. Livesey*, 1 Meriv. 381.

arising in the interval, and where a strong necessity is presented, the court would extend its protection to the lessor (*n*). In the case of *Weston v. Pimm* (*o*), which was cited by the Master of the Rolls, and stated by him to be exactly similar in its circumstances to the case of *Nesbitt v. Meyer*, it was suggested that the lease ought to be antedated; but the bill was dismissed, on the ground that the term to be granted by the lease was determined by a notice to quit given to the lessee by the lessor.

The result of the suit in *Nesbitt v. Meyer* seems, in one sense, to have been a particular hardship on the plaintiff, as the bill was filed before the expiration of the term, but without her fault the hearing was postponed until after the lessee's interest had determined by effluxion of time. In another sense, indeed, the circumstances justified the decision. The only breach alleged by the plaintiff was the cutting down of ornamental timber by the defendant. The latter by his answer denied cutting down timber, except about eighty poles, which were used in repairing the fences; the value of which was estimated by the witnesses at about 3*l*. And, on examining the facts, the Master of the Rolls refused all interference, on the principle of protecting the plaintiff from her own imprudence, and the ill-advised prosecution of her claims. But, as the defendant had infringed upon her rights by felling growing trees, without permission, the bill was dismissed without costs.

The general rule, that all persons interested in the subject in question must be parties to the suit, admits of exception, applicable alike to plaintiffs and defendants; and it is the practice of the court to admit some to represent the absentees, where the rigid enforcement of the rule would be productive of injustice or great inconvenience. *Meux v. Maltby* (*p*) was a case of the latter kind. A bill was filed against certain members (the treasurer and directors) of a joint stock com-

(*n*) *Nesbitt v. Meyer*, 1 Swanst. 223; 3 Ves. & B. 197. A fuller note of the case is to be found in 1 Swanst. 225, n. S. C. 1 Wils. Ch. 97.

(*o*) Reported, nom. *Western v. Pim*, (*p*) *Meux v. Maltby*, 2 Swanst. 277.

pany for a specific performance of an agreement previously entered into by their vendor to grant a lease for twenty-one years to one who afterwards became bankrupt, (the plaintiffs being his assignees), and for an injunction to restrain the defendants from obtaining possession of the premises. The want of all the persons interested in the company as parties being urged as an objection to the bill, Sir Thomas Plumer decided, in conformity with the current of authorities, that the suit had sufficient parties, and that the defendants might be considered as representing the company; but although he could not direct the execution of the lease by a part of the company on behalf of the rest, a conveyance of the interest requiring the concurrence of all, yet he saw no objection to binding the rights of the parties not before the court. It was, therefore, decreed that the plaintiffs were entitled to a lease, and that the defendant, as treasurer, should be restrained from disturbing them in their possession. But a trustee of a numerous company, agreeing to take a lease for the use of the company, cannot support a bill for specific performance, without making some of the members, on behalf of themselves and the others, parties to the suit (*q*).

A party has no right to proceed in equity to compel a defendant to accept a lease, and at the same time to proceed at law to recover payment of rent for use and occupation. If equity decree a specific performance of the agreement, it will of course decree an account of the rent due under it; and the action at law is brought for the same object (*r*). If the plaintiff be unwilling to wait for the rent until the decree, he may move, in equity, that the defendant shall immediately pay that rent, which in every event, would be due from him in respect of his occupation (*s*).

After a decree for the specific performance of a lease, and the deed executed accordingly, the court will restrain the lessee from proceeding at law for damages occasioned by the

(*q*) *Douglas v. Horsfall*, 2 Sim. & Stu. 184.

(*r*) *Carrick v. Young*, 4 Madd. 437.

(*s*) *Ibid.*

defendant's delaying to perform the agreement; for the plaintiff must make his election, either to have a specific performance in equity, or damages at law for breach of the contract; but he shall not have both (*t*). But if the lessee in such a case commence an action at law for damages, the lessor cannot move in the *original* cause for an injunction, that cause being out of court; he must seek relief as in a new suit (*u*).

Two parties having contracted to take a lease, one of them objected to a specific performance, on the ground of a paralytic stroke incapacitating him from doing an act; but the court ordered the other to execute a counterpart, and the invalid to do so when capable (*v*).

The law of specific performance in its application to agreements for renewals, will be found in another part of this work (*x*), to which the reader may apply for a further illustration of the principles contained in this chapter, the analogy between agreements for leases and agreements for renewals being too close to admit of many distinctions. It has, however, been thought advisable to keep the two classes of cases distinct.



SECTION V.—OF THE ADMISSIBILITY OF PAROL EVIDENCE TO EXPLAIN OR ANNUL THE WRITTEN AGREEMENT.

Where an agreement for a lease has been regularly concluded, parol evidence is not admissible at law to supply, explain away, or vary its terms, lest the statute of frauds be eluded, and the same uncertainty introduced by suppletory or explanatory evidence which that statute had suppressed in respect to the principal object (*y*). For example, if the

(*t*) *Ford v. Compton*, 1 Cox, 296.

(*u*) *Ibid*.

(*v*) *Pegge v. Skynner and Richardson*, 1 Cox, 23.

(*x*) *Post*, Part the Fourth. Ch. VII.

(*y*) *Prestour v. Merceau*, 2 W. Blac.

1249. *Merces v. Ansell*, 3 Wils. 275.

Woollam v. Hearn, 7 Ves. 218. See

also *Seago v. Deane*, 1 Mo. & Pa. 227;

S. C. 4 Bing. 459. *Saunderson v.*

Griffiths, 5 Barn. & Cres. 909; S. C.

8 Dow. & Ry. 643.

agreement specify the sum of 26*l.* to be the annual rent, the court will not receive parol evidence to show that the tenant also agreed to pay an additional yearly sum for ground-rent to the ground-landlord (z).

The same rule obtains in equity, when the plaintiff, whether lessor or lessee is immaterial, seeks to enforce a specific performance of an agreement with a parol variation. Thus, where a lease was agreed for by a writing duly signed, to commence from April then next, and afterwards, as the bill stated, an alteration was made with the consent of all parties, by changing the time at which the term was to begin, from April to June in the same year, but the variation was not put into writing, Lord Thurlow decreed that the plaintiffs (the lessees) must confine themselves to their old agreement; for the different period of commencing the lease made a material variation between the latter and the former agreement, as it gave the estate from the owner so many months longer; but that if the second agreement had been that the lease should commence from June, and continue, not for twenty-one years absolutely, but for twenty-one years to determine in April, it would do, because it would be no variation, but only waiving a part (a).

Rich v. Jackson (b) is a leading case upon this subject. The agreement in writing set forth, that one Wm. Stiles agreed to let and grant a lease of the premises for twenty-one years, to be reckoned from Michaelmas, 1791, on Wm. Jackson's paying to the aforesaid Wm. Stiles 84*l.* per annum as follows, that is to say 21*l.* for every quarter; and the said Wm. Jackson did agree to pay the said Wm. Stiles, his heirs, executors, and administrators, the aforesaid sum of 84*l.* per annum, to be paid quarterly as aforesaid. The bill sought a specific performance, alleging that the rent of 84*l.* per annum

(z) *Preston v. Merceau*, sup.

(a) *Jordan v. Sawkins*, 1 Ves. jun. 402; S. C. 3 Bro. C. C. 388. See also *Robson v. Collins*, 7 Ves. 133.

(b) *Rich v. Jackson*, 4 Bro. C. C.

514. The judgment in this case is more fully reported in 6 Ves. 334, note. And see *Clinan v. Cooke*, 1 Scho. & Lef. 39. *Davies v. Fitton*, 2 Dru. & War. 225.

was agreed to be paid clear of all taxes, and parol evidence was offered in support of the allegation; but Lord Loughborough was of opinion, that the plaintiff was concluded by the written agreement, which was, that a lease should be granted for twenty-one years at 80 guineas a year, and the tenant paying his 20 guineas a quarter, including in it his land-tax receipt. His lordship said that he had looked into all the cases, but could not find that the court had ever taken upon itself to add to the form of the agreement; that in repeated instances it had refused to do so, though it had been insisted that the parol evidence of the adverse party had shown the written agreement to be against conscience. The bill was therefore dismissed, but without costs.

So, where a lessee refused to execute a lease, under an agreement, on the ground that part of the land intended to be demised was left out, the plaintiff, who had filed a bill for specific performance, was not allowed to prove by parol evidence, that the premises were omitted by the joint direction of both parties; but his bill was dismissed (*c*).

The rule was further confirmed by Lord Eldon (*d*), and Sir Wm. Grant, M. R. (*e*). In the latter case, the bill was filed by Mrs. Woollam against Hearn for a specific performance, stating that a rent of 73*l.* 10*s.* was inserted in the written agreement by mistake, or with some unfair view, the real agreement being, that the plaintiff was to have the lease upon the same rent as the defendant paid to his lessor, and that he did not pay more than 60*l.*; in support of which allegations she tendered parol evidence; but the Master of the Rolls, although he owned his opinion to be, that if the evidence could be received it would make out the plaintiff's case, for, taking the whole together, there was hardly a doubt that the impression meant to be conveyed was, that the rent should be the same; yet, considering that the statute had been already too much broken in upon by supposed equitable

(*c*) *Lawson v. Laude*, 1 Dick. 346.

groom, 6 Ves. 328.

(*d*) *Marquis of Townshend v. Stan-*

(*e*) *Woollam v. Hearn*, 7 Ves. 211.

exceptions, he refused to go further in receiving and giving effect to parol evidence, than he was forced by precedent; and as there was no case in which the court had gone the length now desired, his honor dismissed the bill, but without costs.

And, upon the same principle, where a party agreed to take a lease upon certain terms which were read to him from a paper containing others not read, the court refused to admit parol evidence offered by him to prove which of the conditions had been read, and which had not (*f*).

Lord Hardwicke, it is true, is reported to have intimated more than once (*g*), that a plaintiff might perhaps be allowed to produce parol evidence in support of a bill for a specific performance of an agreement with a verbal variation; but what his lordship's judgment on the subject would have been is matter for conjecture only. In the latter of the cases cited in the note, where parol evidence was offered by the defendant (the lessor) to show that the rent was to be paid by the plaintiff (the lessee) clear of taxes, his lordship said (*h*), "Suppose the defendant had been plaintiff, and had brought the bill for a specific performance of the agreement, I do not see but he might have been allowed the benefit of disclosing this to the court; because it was an agreement executory only; and as in leases there are always covenants relating to taxes, the Master will inquire what the agreement was as to taxes, and therefore the proof offered here is not a variation of the agreement, but is explanatory only what those taxes were: I am of opinion to allow the evidence of the omission in the lease to be read." This is certainly rather unintelligible. The report in all probability is inaccurate. Such appears to have been the opinion of Lord Rosslyn and of Lord Eldon (*i*). Sir Wm. Grant, afterwards, in commenting on these intimations of Lord Hardwicke, observed (*k*), that they

(*f*) *Brodie v. St. Paul*, 1 Ves. jun. 326. And see 1 Scho. & Lef. 35.

(*h*) 3 Atk. 389.

(*i*) 6 Ves. 337-8.

(*g*) *Walker v. Walker*, 2 Atk. 100; *S. C. Barnard*. 214. *Joyne v. Statham*, 3 Atk. 388.

(*k*) *Woollam v. Hearn*, 7 Ves. 219, 221.

were not decisions, and that it was evident from the manner in which that great judge qualified his own doubts, that he thought it impossible to maintain such a proposition as the plaintiff in *Woollam v. Hearn* was driven to maintain: and, addressing himself to the case of *Joynes v. Statham*, his honor said:—"The parol evidence was received for the purpose of resisting performance of the agreement, and received likewise, not to contradict, but to show, that, as it stood, it did not fully express the meaning and intention of the parties, there being another stipulation agreed upon, but not introduced into the written instrument; and even if that had been a bill by the defendant to carry into execution the agreement, he would not have found it necessary to offer parol evidence to contradict anything in it; for he allowed it to contain the intention, as far as it went; but the provision that the rent was to be clear of taxes was omitted; and Lord Hardwicke, from the particular nature of that stipulation, expresses a doubt, whether, if the defendant had been plaintiff, he might not have been permitted to give evidence, it being usual to leave that open; intimating that it would be merely explanatory as to the taxes."

Lord Redesdale also, in noticing these dicta of Lord Hardwicke, observes (*l*):—"It is true Mr. Atkyns makes Lord Hardwicke say, 'suppose the defendant had been the plaintiff, and had brought the bill for a specific performance of the agreement, I do not see but he might have been allowed the benefit of disclosing this to the court.' This passage was cited for the purpose of showing that Lord Hardwicke thought there might be an addition to the agreement by parol. I have found a reference to a note of the same case by Mr. Brown, who was King's counsel in Lord Hardwicke's time, and in great business, and the manner in which he has put this case is thus:—"But query, if on a bill for performance of an agreement, and an attempt to add to the agreement by parol, whether plaintiff can do it in that case."

Therefore Mr. Brown certainly did not understand Lord Hardwicke as saying that it could be done; and looking attentively at the words used by Atkyns, I do not think they import any thing positive. There is a prior case, *Walker v. Walker*, 2 Atk. 98, where Lord Hardwicke is made to say something similar; and there seems to have been somewhat of a floating idea in the mind of his lordship that by possibility a case might be made in which even a plaintiff might be permitted to show an omission in a written agreement, either by mistake or fraud. However, I can find no decision except the contrary way."

It is not to be understood that the court will never decree a specific performance of an agreement with a variation. The restriction does not affect the case of a subsequent, distinct, collateral agreement in writing; because, if the variation be legally agreed for, it is part of the agreement: if not legally agreed for, it is no variation. All the court means to say, is, that an addition to a written agreement by parol will not vary the instrument (*m*).

But it is clear, by analogy, that such an actual part-performance by the plaintiff of a parol variation, as would amount to a fraud on him, in case the original agreement should be executed without it, would justify the admission of parol evidence on his part to prove the terms of the variation, with a view to its being specifically performed. Nor is authority wanting in support of the proposition; for we find a case in *Viner's Abridgment* (*n*), where W. leased a house to N. for eleven years, and was to allow 20*l.* to be laid out in repairs; and the agreement was reduced into writing, and signed and sealed by both parties. N. repaired the house, and finding it to take a much greater sum than 20*l.*, told W. of it, and that he would nevertheless go on and lay out more money, if he would enlarge the term to twenty years, or add fourteen, or as many as N. should think fit. W. replied that

(*m*) *Rich v. Jackson*, 4 Bro. C. C. lins, 7 Ves. 133.

519; 6 Ves. 338, n. *Robson v. Col-*

(*n*) *Anon.*, 5 Vin. Ab. 522. pl. 38.

they would not fall out about that; and afterwards declared that he would enlarge the term, without mentioning any term in certain; and upon a question being raised, whether this new agreement made by parol, which varied from the written agreement, should be carried into execution, notwithstanding the statute of frauds, the Master of the Rolls said, that before the statute, written agreements could not be controlled by a parol agreement contrary to it, or altering it; but this was a new agreement, and the laying out the money was a performance on one part, and ought to be carried into execution.

With respect, however, to the admissibility of parol evidence to alter the terms of a written instrument, an important difference has long been established in the circumstance of the party offering it being plaintiff or defendant. The rule so strictly enforced against the former, is frequently relaxed in favor of the latter; the court considering, that equity, when called upon to exercise its peculiar jurisdiction, by decreeing a specific performance, should permit the party charged to show that, under the circumstances, the plaintiff is not entitled to have the agreement specifically performed (*o*), and numerous cases, some of which may be selected by way of example, have enforced the distinction. Fraud, mistake, omission, and surprise, are the grounds on which this branch of equity is administered.

In explaining the reasons of the difference, Lord Redesdale's words may be adopted (*p*):—"It should be recollected (said his Lordship) what are the words of the statute: 'No person shall be charged upon any contract or sale of lands, &c., unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.' No person shall be charged with the execution of an agreement who has not either by himself or

(*o*) 7 Ves. 219. *Flood v. Finlay*, 2 Ball & Beat. 51.

(*p*) 1 Selw. & Lef. 39.

his agent signed a written agreement; but the statute does not say that if a written agreement is signed, the same exception shall not hold to it that did before the statute. Now, before the statute, if a bill had been brought for specific performance, and it had appeared that the agreement had been prepared contrary to the intent of the defendant, he might have said, 'that is not the agreement meant to have been signed.' Such a case is left as it was by the statute: it does not say that a written agreement shall bind, but that an unwritten agreement shall not bind."

One of the earliest cases on the point is *Joynes v. Statham* (q). A bill was filed for a specific execution of a contract for a lease, in the plaintiff's handwriting, upon the face of which it appeared that he was to pay a rent of 9*l.* only: but the defendant, who could not write, insisting by his answer, that the agreement ought to have contained a provision that the rent was to be paid clear of all taxes, in consideration of which he had made a proportionable abatement in the rent, Lord Hardwicke allowed him the benefit of parol evidence to prove the omission, by way of objection to the plaintiff's bill.

In *Legal v. Miller* (r), there was an agreement in writing for taking a house at 32*l.* per annum, and part of the agreement was, that the owner should put the house in repair. It was afterwards discovered not to be worth repairing, but that it would be better to pull it down; and without alteration of the written agreement, the house was pulled down by consent of the tenant, who, apprised of the great expense it would be to the landlord, agreed by parol to add 8*l.* per annum to the 32*l.* The tenant brought a bill for a lease on the foot of the written agreement, under which he was to pay only the 32*l.* rent; but Sir John Strange, M. R., admitted parol evidence, on the defendant's part, to prove the subsequent agreement, and to rebut the equity insisted on by the

(q) *Joynes v. Statham*, 3 Atk. 368.

(r) *Legal v. Miller*, 2 Ves. 299. See also *Price v. Dyer*, 17 Ves. 364.

bill; and, being satisfied from the evidence that a specific performance should not be decreed, dismissed the bill.

The great case of the Marquis of Townshend *v.* Stangroom before Lord Eldon (*s*), and subsequent cases before Lord Manners (*t*), Sir Wm. Grant (*u*), Sir Thomas Plumer (*x*), and Sir Edward Sugden (*y*), were decided on the same ground, and fully explain and illustrate the distinction taken between the situation of a plaintiff seeking the performance of a written agreement with a parol variation, and of a defendant offering the variation to rebut the plaintiff's equity.

It may be taken as a general rule, that if a parol agreement varying the terms of a written agreement be set up by the defendant in a suit for specific performance, and supported by evidence affording a presumption or suspicion of its existence, an inquiry will be directed (*z*).

Mere variations verbally agreed to, however, are not of themselves sufficient to prevent the execution of a written contract, if the situation of the parties in all other respects remain unaltered. There must be some consideration for the change; some suggestion of omission, fraud, or mistake; or the variations must have been so acted upon, that the original agreement can no longer be enforced without injury. This was determined by Sir Wm. Grant in the case of Price *v.* Dyer (*a*). The bill prayed a specific performance of an agreement for a lease by Dyer, which ran in these words:—"Memorandum of agreement between John Dyer, of East Ham, in the county of Essex, and Daniel Price, of Cornhill, London, wherein I do agree to let unto the said Daniel Price the house, stabling, gardens, and field, at the net rent of 60 guineas per annum, on lease of seven, fourteen, or twenty-one years, Daniel Price paying all taxes; to com-

(*s*) Marquis of Townshend *v.* Stangroom, 6 Ves. 323. See also Hosier *v.* Read, 9 Mod. 36.

(*t*) Flood *v.* Finlay, 2 Ball & Beat. 9.

(*u*) Woollam *v.* Hearn, 7 Ves. 211.
Clarke *v.* Grant, 14 Ves. 519.

(*x*) Garrard *v.* Grinling, 2 Swanst. 244; S. C. 1 Wils. 460.

(*y*) Davies *v.* Fitton, 2 Dru. & War. 225.

(*z*) Van *v.* Corpe, 3 Myl. & Keen, 269.

(*a*) Price *v.* Dyer, 17 Ves. 356.

mence at Lady-day next; and Daniel Price does agree to take the fixtures as stated on the other side at a fair valuation. John Dyer, East Ham, 8th of March, 1809." About ten days afterwards, the defendant, by parol, agreed to demise to the plaintiff an additional piece of land; and the rent was to be increased to 65*l*. The plaintiff took possession on the 25th of March, 1809. The defendant set up a parol agreement, of the 2nd of April, 1809, made at the office and in the presence of his solicitor, by which the parties mutually abandoned the terms of the written agreement, and agreed that the lease should not be for the term of twenty-one years absolute in all events, but should be determinable by Dyer at the expiration of seven or fourteen years, unless the plaintiff should within the first seven years build two good rooms southward of the dwelling-house; but that if the plaintiff did build the said two rooms within that time, then the lease was to be absolute for the whole term of twenty-one years; though the precise sum to be laid out in building the said rooms was not then finally agreed upon; and it was also at the same time agreed between the plaintiff and the defendant, that the annual rent should be 65*l*.; and that the plaintiff should insure the premises against fire; and should not underlet or assign without a written license from the lessor; and that the field should not be broken up or ploughed; and that all the usual covenants should be inserted in the lease. The defendant's solicitor took a note of the new agreement in the following words:—"Lease for seven, fourteen, or twenty-one years, in consideration of Mr. Price laying out the sum of —*l*. in building two rooms southward of the dwelling-house, within the first seven years, then the lease to be absolute for twenty-one years; rent 65*l*. per annum; Mr. Price to insure the premises; not to let or assign without leave in writing of the lessor; and that the field should not be broken up or ploughed." The Master of the Rolls, in giving judgment, observed, that there were two things to be considered; first, whether the agreement of the 8th of March, 1809, was origi-

nally such as the court would have carried into execution ; if it was, then whether what passed subsequently ought to prevent a specific performance. His honor said, that the answer did not state any objection to the agreement, as being unfair or incorrect ; and that he did not see how it was possible to deny effect to a written agreement, upon the ground that it did not fairly state the meaning of the parties, where the defendant did not allege that to be the case in fact, or even according to his own conception of it : that the agreement must therefore be taken to have been originally unexceptionable, and that the variations verbally agreed on were not sufficient to prevent the execution of the written agreement, the situation of the parties in all other respects remaining unaltered : that the defendant had expended nothing upon the faith of having the added stipulations performed : that he had sustained no positive loss, and would only be disappointed of that advantage which he expected to derive from the gratuitous covenants of the plaintiff : that gratuitous they clearly were, as it could not be seriously represented that the obligation to build could be considered a privilege conferred upon him : and, therefore, his honor did not deem himself warranted upon authority or principle in refusing a specific performance of the written agreement ; but under the circumstances of the case, he did not think the plaintiff entitled to the costs of the cause.

According to the better opinion (*b*), a written contract may be discharged by parol ; but then the waiver and abandonment must be mutual, and must amount to a total dissolution of the contract, placing the parties in the situation in which they stood before the agreement was entered into (*c*) ; though such a defence must be established with the greatest clearness and precision (*d*).

(*b*) *Goman v. Salisbury*, 1 Vern. 240 ; S. C. 1 Eq. Ca. Ab. 22. pl. 15. *Coles v. Trecothick*, 9 Ves. 250. *Price v. Dyer*, 17 Ves. 363. *Robinson v. Page*, 3 Russ. 119.

(*c*) *Ibid.* But see the conclusion of Lord Thurlow's judgment in *Jordan v. Sawkins*, 1 Ves. jun. 404.

(*d*) *Robinson v. Page*, 3 Russ. 119.

In conclusion, we may remark, that if a plaintiff fail in obtaining a specific performance of the contract, and on the terms prayed by his bill, he cannot get a decree, in the same suit, upon the agreement or terms established by the defendant's answer and evidence. For this purpose he must file another bill (*e*).

(*e*) *Legal v. Miller*, 2 Ves. 299. *Woollam v. Hearn*, 7 Ves. 222. See also *Clarke v. Grant*, 14 Ves. 525.

Part the Fourth.

OF THE TERM OF THE LEASE.

OUR next subject of inquiry relates to the periods or terms for which leases may be granted, and will be noticed under the following divisions:—

- I. As to leases at will.
 - II. As to leases for any aliquot part of a year; for a year certain; or from year to year.
 - III. As to leases for an absolute term of years.
 - IV. As to leases for a term of years determinable with a life or lives, or on any other event.
 - V. As to leases for a term, with the grant of an accessional term on an event.
 - VI. As to leases for a life or lives.
 - VII. As to renewable leases.
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CHAPTER I.

AS TO LEASES AT WILL.

LEASES at will may be created by express terms, or may arise by construction or implication of law. In modern practice, the former are comparatively unknown, and, with respect to the latter, the law has undergone considerable change. Formerly, all leases for uncertain periods, unaccompanied by livery of seisin, were held to constitute tenancies

at will merely. If a termor granted the land generally, the grantee was but tenant at will; as it did not appear that the grantor meant to pass his whole interest, an estate at will was held to satisfy the grant (*a*). So, a demise for such term as both parties should please created but an estate at will, the term being altogether uncertain (*b*).

But though leases for uncertain terms, unaccompanied by livery, still confer *prima facie* but estates at will (*c*), the judges since the days of Croke (*d*) have evinced a disposition to construe tenancies of this description into tenancies from year to year, particularly if an annual rent be reserved (*e*). The reservation of an annual rent is indeed one principal criterion of distinction between tenancies from year to year and tenancies at will (*f*). And, in the absence of more direct evidence of the actual periods of reservation, payment and acceptance of the rent at particular times of the year are equivalent to an actual reservation on those days, and admissible to prove the nature of the tenancy (*g*). Acknowledgment of the existence of an arrear of half a year's rent is admissible for the same purpose (*h*).

Yet, notwithstanding this disposition, tenancies at will are not wholly unknown; and the remark ascribed to Mr. Justice Wilmot (*i*), that "in the country, leases at will, in the strict legal notion of a lease at will, being found extremely inconvenient, exist only notionally, and were succeeded by another species of contract which was less inconvenient," if

(*a*) Griffin's case, 2 Leon. 78. Germain, or Jermau, v. Orchard, Holt, 331; S. C. 1 Salk. 346; 3 Salk. 222; Skin. 523; 12 Mod. 11; 1 Freem. 500. Doe dem. Hull v. Wood, 14 Mees. & Wel. 682-4.

(*b*) The Bishop of Bath's case, 6 Co. 35, b. 1 Rol. Ab. 351, Estate, (A). 7.

(*c*) Roe dem. Bree v. Lees, 2 W. Blac. 1173.

(*d*) Ibid. cites Cro. Eliz. 775.

(*e*) 2 Bla. Com. 147. 16 Ves. 252. Doe dem. Hull v. Wood, 14 Mees. & Wel. 682-4.

(*f*) Roe dem. Bree v. Lees, 2 W. Blac. 1173. Doe dem. Hollingsworth v. Stennett, 2 Esp. 717. Pope v. Garland, 4 Yo. & Col. Exch. 394. 399. Doe dem. Hull v. Wood, sup.

(*g*) Knight v. Benett, 3 Bing. 361; S. C. 11 J. B. Mo. 222. Doe dem. Hollingsworth v. Stennett, 2 Esp. 718.

(*h*) Cox v. Bent, 5 Bing. 185; S. C. 1 Mo. & Pa. 231. See also Regnart v. Porter, 7 Bing. 451; S. C. 5 Mo. & Pa. 370.

(*i*) Timmins v. Rowlinson, 3 Burr. 1609.

indeed it was ever made, must, it is apprehended, be understood to signify, that it is no longer usual to create such estates by express words, and that the judges incline strongly against implying them (*k*). Sir W. Blackstone's report of Mr. Justice Wilmot's observation differs from Burrow's: he is there stated to have said, that tenancy from year to year had almost extinguished tenancy at will, which was a most unreasonable and inconvenient tenure to both parties (*l*).

As an instance of a lease at will created in express terms, we may state, that if premises be let for such length of time as both parties shall like, and the lessor reserve a compensation accruing *de die in diem*, and not referable to a year, or any aliquot part of a year, the contract does not create a holding from year to year, but a tenancy at will, strictly so called (*m*).

If a party contracting for the purchase of land be let into possession, he is tenant at will by implication of law (*n*).

According to *Doc v. Stennett* (*o*), a tenancy of this kind may also arise by the tenant whose lease is expired being permitted to continue in possession, pending a treaty for a further lease. But it deserves consideration whether this would not rather be a tenancy by sufferance (*p*).

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The tenancy may be determined by either party at any time; but (supposing the lease to be expressly at will, and not by construction of law from year to year,) if the rent be payable quarterly, and the lessor determine his will after the commencement of a new quarter, he will lose all the rent that would be due for that quarter; and the lessee will be entitled to the emblements (*q*). So, the lessee at will may

(*k*) Hargr. Co. Lit. 55, a. n. (3).
2 Bla. Com. 147.

(*l*) *Timmins v. Rowlison*, 1 W. Blac. 535.

(*m*) *Richardson v. Langridge*, 4 Taunt. 123.

(*n*) *Ball v. Cullimore*, 5 Tyrw. 753;
S. C. 1 Gale, 96.

(*o*) *Doc dem. Hollingsworth v. Stennett*, 2 Esp. 717.

(*p*) See *Simkin, or Simpkin, v. Ashurst*, 1 Crompt. Mees. & Ros. 261;
S. C. 4 Tyrw. 731.

(*q*) *Leighton v. Theed*, 1 Ld. Raym. 707; S. C. 2 Salk. 413; S. C., nom. *Layton v. Field*, or *Feild*, Holt, 415; 3 Salk. 222. Co. Lit. 55, a. b. 2 Bla. Com. 146. *Kighly v. Bulkly*, 1 Sid. 333-9. Anon. Keilw. 65. pl. 6. Anon. 12 Mod. 610.

determine his will when he pleases; but then he must pay the rent for all the quarter in which the tenancy is determined (*r*). And it is submitted that the remark in *Title v. Grevett* (*s*), that if a tenant at will enter upon a quarter, though but one day, he cannot determine his will, must be understood with the qualification that he cannot determine it without paying his quarter's rent.

So, if the lessee himself determine the will before the severance of the corn, he will not be entitled to the emblements, his interest being defeated by his own act (*t*).

Generally speaking, the death of either party will determine a tenancy at will (*u*).

A few exceptions may be mentioned. If two joint tenants make a lease at will, rendering rent, and one die, all survives to the other; and, if the lessee continue his possession, the survivor may maintain an action for the whole rent (*x*).

And, on the other hand, if a lease be made to three, rendering rent, the death of one does not effect a determination of the will; but the survivors are chargeable with the whole rent (*y*).

A lease at will made by a feme sole is not determined by her marriage, without some express act of the husband to put an end to the tenancy (*z*). Nor is a lease made to a feme sole determined by her marriage (*a*). Nor, if husband and wife lease the wife's land at will, rendering rent, is the death of the husband a determination of the will (*b*).

By making a feoffment, even without the tenant's knowledge (*c*), or by granting a lease for years to a stranger to

(*r*) *Ibid.* *Bowe's case*, Al. 4. *Timberley v. Grobham-How*, T. Jo. 5.

(*s*) *Title v. Grevett*, 2 Ld. Raym. 1008.

(*t*) *Oland's case*, 5 Co. 116, a.

(*u*) *Crockerell v. Owerell*, Holt, 417. *James v. Dean*, 11 Ves. 391. *Attorney General v. Lord Foley*, 2 Dick. 363-6.

(*x*) *Henstead's case*, 5 Co. 10, b. Co. Lit. 55, b.

(*y*) *Henstead's case*, 5 Co. 10, a.

3 Dy. 269, b. pl. (20).

(*z*) *Henstead's case*, 5 Co. 10, a. Co. Lit. 55, b.

(*a*) *Ibid.*

(*b*) *Henstead's case*, 5 Co. 10, b. Co. Lit. 55, b. 1 Rol. Ab. 361, Estate, (Z). 5. See as to leases by husband and wife, ante, p. 138.

(*c*) *Ball v. Cullimore*, 5 Tyrw. 753; S. C. 1 Gale, 96.

commence presently, the lessor determines the estate of his tenant at will, although, in the latter case, it be stipulated that the new lessee shall not enter until after the day upon which the rent upon the lease at will will become due (*d*). An agreement by the lessor for the sale of the freehold to the tenant at will has the same effect (*e*). In short, it may be stated in general terms, that any act by the lessor inconsistent with the continuance of the estate at will will determine it (*f*).

But such an estate will not be terminated by the outlawry of the lessor, until a seisure; nor by an extent upon him, until the *liberate* (*g*).

On the other hand, the tenant, by leasing, or exercising other acts of ownership incompatible with the nature of his estate, may determine the tenancy, and give the lessor a right to a general action of trespass without entry (*h*).

In debt for rent due upon a lease at will, the plaintiff must show an occupation; for the rent is due only in respect thereof; and, therefore, it must appear to the court when the lessee entered, and how long he occupied (*i*); but in debt for rent on a lease for years at common law (*k*), the plaintiff need not set forth any entry or occupation; for though the defendant neither enter nor occupy, he must pay the rent, it being due by the lease or contract (*l*). This proposition, however, apparently assumes an execution of the lease by the lessee.

(*d*) *Dinsdale v. Iles*, or *Dunsdale v. Isles*, 2 Lev. 38; T. Raym. 224; 3 Keb. 166. 207; S. C., nom. *Hinchman v. Iles*, 1 Vent. 247.

(*e*) *Daniels v. Davison*, 16 Ves. 249. 252.

(*f*) *Hinchman v. Iles*, 1 Vent. 247.

(*g*) *Ibid.*

(*h*) Countess of Shrewsbury's case, 5 Co. 13, b. *Moss v. Gallimore*, 1 Dougl. 279. 283. *Birch v. Wright*, 1 Term Rep. 382.

(*i*) *Bellasis v. Burbrick*, Holt, 199; S. C. 1 Salk. 209. S. P. 1 Vent. 41. 4 Leon. 18. And see *Gostwicke v. Mason*, 1 Mod. 3; S. C. 1 Sid. 423; S. C., nom. *Costricke v. Mason*, 2 Keb. 543.

(*k*) As to leases under powers, see Nugent dem. *Atkins v. Sealy*, Ale. & Nap. 359. Taylor dem. *Atkyns v. Horde*, 1 Burr. 60. 125, and ante, p. 517.

(*l*) See cases in note (*i*) sup.

CHAPTER II.

AS TO LEASES FOR ANY ALIQUOT PART OF A YEAR; FOR A YEAR; OR FROM YEAR TO YEAR.

LEASES may also be granted by express terms for a year, or any part of a year; but the lessee is still regarded as a tenant for years, a year being the shortest period of which the law in this case takes notice (*a*).

If a lease be granted for a year, the tenant is bound to quit at the end of the year without notice (*b*).

If the lease be expressly for a year certain, at a rent payable at specified periods, and the tenant hold over after the expiration of the year, without any new agreement, he becomes tenant at sufferance (*c*), and so remains until, by payment of rent, or other acknowledgment of tenancy, he is converted by construction of law into a tenant from year to year (*d*).

A lease for twelve months will enure for forty-eight weeks only; but a lease for a twelvemonth will last for a whole year (*e*).

A lease from year to year, according to some early cases (*f*), will confer a title for two years certain; though, in treating

(*a*) 2 Bla. Com. 140. Lit. s. 67. *Simpkin, or Simkin, v. Ashurst*, 4 Tyrw. 781. 783; S. C. 1 *Crompt. Mees. & Ros.* 261. *Lloyd v. Rosbee*, 2 Campb. 453-4.

(*b*) *Johnstone v. Hudleston*, 4 Barn. & Cres. 922. 937; S. C. 7 Dow. & Ry. 411.

(*c*) *Winch*, 32. 1 Dy. 62, a. pl. (34). Co. Lit. 57, b. *Right dem. Flower v. Darby*, 1 Term Rep. 159. 162. And see *Doe dem. Tilt v. Stratton*, 4 Bing. 446; S. C. 1 Mo. & Pa. 183; 3 Car. & Pa. 164.

(*d*) *Mann v. Lovejoy*, 1 Ry. & Moo.

355. *Right dem. Flower v. Darby*, sup. *Doe dem. Calvert v. Frowd*, 4 Bing. 557; S. C. 1 Mo. and Pa. 480. *Doe dem. Clarke v. Smarridge*, 9 Jur. 781; S. C. Law Jour. N.S. vol. 14, p. 327, Q. B.

(*e*) *Catesby's case*, 6 Co. 62, a. 2 Bla. Com. 141. 1 Steph. Com. 265.

(*f*) *Agard v. King*, Cro. Eliz. 775. *Legg v. Strudwick, or Stradwick, Holt*, 417; S. C. 2 Salk. 414; & 11 Mod. 203, where the term and judgment are differently reported. And see *Crookrell v. Owerell*, Holt, 417.

of the effect of a demise for a year, and so from year to year (*g*), we shall see, from the discrepancy of the authorities, how the law upon the point has fluctuated. But it has lately been decided (*h*), that a tenancy from year to year, so long as both parties please, is determinable at the end of any year, the first as well as any subsequent one, unless, in the creation of the tenancy, the parties introduce provisions, showing that they contemplated a tenancy for two years at the least.

The interest acquired by a tenant from year to year is transmissible to his representatives (*i*). Lord Mansfield, however, is reported (*k*) to have drawn a distinction between a demise to one, without naming his executors, from year to year as long as both parties should please, and a demise of the like kind extending to executors; and to have said that the former would determine at the end of the year after death without notice; but that the latter continued till the executor determined it by notice.

Whether a term for a single year, or for two or more years, passes under a demise for a year, and so from year to year as long as both parties shall please, has occasioned some discussion. The decisions and dicta on the subject do not exhibit much consistency.

The very early cases appear to determine that a demise of this description would enure for three years. In Potkins's case, which arose in the time of Henry the 8th, and is the first perhaps on record (*l*), the judges, according to Coke (*m*), were divided in opinion, two being opposed to two; though,

(*g*) *Infra*, in this page.

(*h*) *Doe dem. Clarke v. Smarridge*, 9 Jur. 781; S. C. Law Jour. N. S. vol. 14, p. 327, Q. B.

(*i*) *Doe dem. Shore v. Porter*, 3 Term Rep. 13. *James v. Dean*, 11 Ves. 393.

(*k*) *Mackay v. Mackreth*, 4 Dougl. 213; S. C. cited, 3 Term Rep. 13; S. C. 2 Chit. 461, where the distinction is not noticed. And see *Gulliver dem. Tasker v. Burr*, 1 W. Blac. 596.

(*l*) Potkins's case, 14 H. 8. 10. [B.] 6.

(*m*) 6 Co. 35, b. It is observable, however, that the words of the demise are not correctly reported by Coke. The lease was *p'terme d'un an, a com-mencer al feste de Saint Michel, a durer tanq: al fin dit an, et sic le prochain an, de an in an si longement come al parties plait*; while Coke states the demise to have been *pro term. unius anni et sic de uno anno in annum quandiu am-babus partibus placuerit*.

he adds, it is now resolved, *per totam curiam*, that in such case after three years *ad maximum*, it was but a lease at will, because beyond that the term had not any certain continuance or determination.

Winch also reports that a lease for a year, and so from year to year at the pleasure of the parties, confers a term for three years, and not for two (*n*). And Keble, in like manner, states that, in *Costrike v. Mason* (*o*), a case decided in the King's Bench, 21 Car. 2., a lease in similar terms was held to operate as a demise for three years, not at will after the first year; but it is scarcely necessary to say that his reports are not entitled to much confidence; and the point is not reached by the report in 1 Modern, and 1 Siderfin.

So, in *Panton v. Isham* (*p*), where the letting was for a week, and so from week to week as long as both parties should please, the court held that the demise could be no more than a term for three weeks, and that for the residue the lessee was tenant at will.

When the same point came before the court of Common Pleas in 8 & 9 W. 3 (*q*), they held the lease good for two years, and after that at will; relying, singularly enough, on Potkins's case in support of the determination. And the case of Stanfill, or Stanfitt, *v. Hickes* (*r*), decided very soon afterwards in the same court, is to the same effect; though the real question for decision related to the legality of a distress. To his note of the case, Salkeld adds, "The reporter tells us the law is contrary."

Next in succession is a series of judgments and dicta by Chief Justice Holt, which I shall submit in chronological order, directly at variance with the decisions in the cases already quoted.

(*n*) Anon. Winch, 32. Tr. 20 Jac.

(*o*) *Costrike v. Mason*, 2 Keb. 543. And see S. C., nom. *Gostwicke v. Mason*, 1 Mod. 3; 1 Sid. 423.

(*p*) *Panton v. Isham*, 3 Lev. 359. Hil. 5 W. & M.

(*q*) *Bellasis v. Burbriche*, 1 Ld.

Raym. 170; S. C. *Belasyse v. Burbridge*, Lutw. Nels. fol. ed. of 1713, p. 66.

(*r*) *Stanfill v. Hickes*, 1 Ld. Raym. 230; S. C., nom. *Stanfitt v. Hickes*, 3 Salk. 135. And see *Stomfil v. Hicks*, 2 Salk. 413.

The question was first determined by Holt at the Lincoln Summer Assize in the year 1699 (*s*), when he held that a demise of lands to B. for a year, and so from year to year, was not a lease for two years, and afterwards at will; but was a lease for every particular year; and that after the year was begun, the defendant could not determine it before the year was ended.

Two years afterwards, in the case of *Leighton v. Theed* (*t*), he said, that under such a demise the lessor might determine his will at the end of any year; but that should any new year be begun, it could not be determined before the end of the year. So, in 12 Mod. (*u*) he is reported to have said, that the lease enured for one year absolutely, and that the lessee, by continuing on the first day of the second year, was bound for another year.

He continued of the same opinion in the 3rd year of Queen Anne's reign (*x*), declaring that a lease in the same terms was binding but for one year; but that if the lessee without countermand of the lessor entered upon the second year, he was bound for that year, and so on.

Crockerell v. Owerell (*y*) in a measure involved the point, but the court did not determine whether the lease conferred a term for two years certain or not.

Legg v. Strudwick, decided in the 7th year of the reign of Queen Anne, demands peculiar attention, as being one of the cases on which Lord Ellenborough founded his assertion (to which I shall presently more particularly advert) that Holt's opinion in *Lely v. Green* had been overruled. The case in question is reported by Holt (*z*), by Salkeld (*a*), and in the 11th volume of Modern Reports (*b*). Holt and

(*s*) *Lely v. Green*, cited, 1 Ld. Raym. 708; S. C. Holt, 414; 2 Salk. 413.

(*t*) *Leighton v. Theed*, 13 W. 3, 1 Ld. Raym. 707-B. And see S. C., nom. *Layton v. Field*, 3 Salk. 222.

(*u*) Anon. 12 Mod. 610, 13 W. 3, probably the same case.

(*x*) *Dod v. Monger*, Holt, 416; S. C.

6 Mod. 215.

(*y*) *Crockerell v. Owerell*, 5 Anne, Holt, 417.

(*z*) *Legg v. Strudwick*, Holt, 417.

(*a*) 2 Salk. 414.

(*b*) S. C., nom. *Legg v. Stradwick* 11 Mod. 203.

Salkeld concur in their statement of the facts and judgment, both of which are differently represented in 11 Mod. According to the book last mentioned, a lease was made to J. B. from the 25th of March, unto the full end and term of one year, and so *de anno in annum quamdiu ambabus partibus placuerit*; and Holt, C. J., said, "Such a lease as this is not a lease for two years, or a lease at will, but 'tis a lease for every particular year, and yet you may distrain for ten years' rent at the end of ten years; because one lease springs so out of the other, and out of the same contract, as that when one year is ended, there is an end of that lease, and when the lessee enters on another year, 'tis another lease for a year, *et sic toties quoties*." Holt and Salkeld, on the contrary, report the demise to have been to A., *habendum de anno in annum, et sic ultra quamdiu ambabus partibus placeret*, and the court to have been of opinion, that after the two years the lessor or lessee might determine the tenancy; but that if the lessee held on, he was not then tenant at will, but for a year certain; for his holding on must be taken to be an agreement to the original contract and in execution of it.

Before I offer any comment on the variance between these reports, I shall proceed to the remark of Lord Ellenborough already alluded to. In the course of argument in the case of *Denn v. Cartright* (c), the decision of Holt in *Lely v. Green*, that a demise for a year, and so from year to year, did not operate as a lease for two years unless the second year had commenced, being pressed on the attention of the court, Lord Ellenborough said, "There is another case in the same page of the book (d), of *Bellasis v. Burbriche*, and another in the subsequent page, of *Legg v. Strudwick*, which overrule that opinion: and these latter agree with common experience, that a demise for a year, and so on from year to year, must enure as a tenancy for at least two years; and so it is declared to be by Mr. Justice Buller in *Birch v. Wright* (e), where he considers the cases in Salkeld."

(c) *Denn dem. Jacklin v. Cartright*,
4 East, 31-2.

(d) *Salk.* 413.
(e) *Birch v. Wright*, 1 Term Rep. 330.

Without impugning the propriety of Lord Ellenborough's dictum, I may endeavour to show, that if it rest on the cases of *Bellasis v. Burbriche*, and *Legg v. Strudwick*, it has not the advantage of a very solid foundation.

First, as *Bellasis v. Burbriche* was decided in the Common Pleas between two and three years before Holt's determination in *Lely v. Green*, it cannot strictly be said to have overruled that determination : and so far from Mr. Justice Buller's having given the case the confirmation of his own authority, he expressly declared (*f*) that *Bellasis v. Burbriche* and *Lely v. Green* were short loose notes jumbled together and not to be relied on.

Secondly, as to *Legg v. Strudwick*. The conflicting reports of it have already been noticed. Now, if that contained in 11 Mod. be correct, the case, instead of overruling Holt's opinion, is a fresh corroboration of it by Holt himself. If, on the other hand, Holt's and Salkeld's are to be preferred, where the demise is stated to have been *de anno in annum, et sic ultra quamdiu ambabus partibus placeret*, it can scarcely be quoted as overruling that opinion, applied, as it was, to a demise for a year, and so from year to year as long as both parties should please.

With respect to Lord Ellenborough's remark, that Mr. Justice Buller, in *Birch v. Wright*, where he considered the cases in *Salkeld*, declared that a demise for a year, and so on from year to year, enured as a tenancy for at least two years, I shall merely add, that I am unable to discover this declaration in the report : that learned judge did not deny that such might be the operation of the lease ; but it does not appear that he expressed any opinion on the point.

In 1736, we find Lord Hardwicke, C. J., at the sittings, ruling, on the authority of *Lely v. Green*, Sulk. 413, that a demise for a year, and so from year to year, was a lease for every particular year, and good for every year that the lessee entered into (*g*).

(*f*) 1 Term Rep. 380.

(*g*) *Combes v. Cole*, Ca. temp. Hardw. by Lee, 305.

In another case in the Exchequer (*h*), in 1756, a question arose as to the interest taken by the plaintiff under a lease made to him by the defendant, to hold from Michaelmas day for one whole year, and so for two or three years, or any such further term of years as the said defendant and plaintiff should think fit and agree on; yielding and paying for the said one year, and from thence yearly and every year, during such term or terms, as should be thereafter granted, 35*l.* per annum; and, according to Ambler's report, the court declared their opinion to be clearly, that it was a lease but for one year only, without a subsequent agreement; and that if it had been doubtful on the words of the habendum, those under the reservation fully explained them.

The report of the case by Wilson gives a different decision, and in these terms:—" *Per Cur.* A lease to hold to R. Harris, from Michaelmas for one year, and so for two or three years, or any further term of years as the said N. Evans and R. Harris shall think fit and agree, from and after the expiration of the said term of one year, is a lease for two years, and after every subsequent year begun is not determinable till that be ended, like 2 Salk. 414." Mr. Blunt (the editor of the 2nd edition of Ambler's Reports) searched in vain for any entry of the case in the record books of the court of Exchequer; and infers that Ambler was probably the more correct in his report, being one of the counsel engaged in the cause.

In the case of *Goodright v. Richardson* (*i*), before the court of King's Bench in 1789, where a question was made as to the estate taken under a lease for the term of three, six, or nine years, from the Feast day of St. Thomas the Apostle next ensuing from the date thereof, and to be fully complete and ended on the said Feast day of St. Thomas the Apostle, which should be determinable in the years 1788, 1791, 1794, Lord Kenyon said, "It is like a lease for a year, and so from

(*h*) *Harris v. Evans*, Ambl. 329;
S. C. 1. Wils. 262.

(*i*) *Goodright dem. Hall v. Richardson*, 3 Term Rep. 462. A.D. 1789.

year to year, where, if the lessee wish to determine it at the end of the year, he must give reasonable notice to the other party," which would seem to imply that, in his lordship's opinion, no more than a term for one year certain, determinable with notice, would pass.

In the case of *Johnstone v. Hudlestone* (*k*), the demise was for one year then next ensuing and fully to be complete and ended, and so from year to year for so long time as the defendant and plaintiff should respectively please; but the point did not call for a decision, as the lessee had occupied the premises for a period exceeding two years before he gave notice to quit.

The like remark applies to *Buckworth v. Simpson* (*l*), where the demise and circumstances were very similar.

Doe v. Green (*m*) bears more closely on the point. A lease was made "for one year from the date thereof, and so on from year to year, until the tenancy hereby created shall be determined as after mentioned," at the yearly rent of 10*l.*, to be paid quarterly, "and three months shall be sufficient notice to be given from either" of the parties. And it was further agreed "that it shall be lawful for the said Joshua Chadborn to determine the tenancy by either of us giving unto the other three months' notice of either of their intentions." And it was held, that the language of the contract clearly contemplated a term longer than one year, and that three months' notice to quit at the end of the first year was insufficient. And this (said Lord Denman, C. J.,) is consistent with the doctrine laid down in *Birch v. Wright* (*n*), and with sound reason.

And a still later case (*o*) is to the same effect. Certain premises were let for the term of six months from the 1st day

(*k*) *Johnstone v. Hudlestone*, 4 Barn. & Cres. 922. A.D. 1825.

(*l*) *Buckworth v. Simpson*, 1 Crompt. Mees. & Ros. 334. A.D. 1835.

(*m*) *Doe dem. Chadborn v. Green*, 9 Adol. & Ell. 653; and see note (*d*), p. 661; S. C. 1 Per. & Dav. 454. A.D.

1839; and *Doe dem. Monek v. Geckie*, 5 Q. B. 341.

(*n*) 1 Term Rep. 378.

(*o*) *Regina v. The Inhabitants of Chawton*, 1 Q. B. 247; S. C. 4 Per. & Dav. 525. A.D. 1841.

of January, 1830, and so on for six months to six months until one of the said parties should give to the other of them six calendar months' notice in writing to determine the tenancy; at and under the rent of 13*l.* for every six months, the first payment to be made on the 1st day of July, 1830. And it was held, that this was clearly a taking for two half years, which made a whole year. If, therefore, for *six months* we substitute *a year*, it leads to the inference that a demise for a year, and so on from year to year, amounts to a letting for at least two years certain.

To sum up the cases, it appears, that Potkins's case; *Costrike v. Mason*, according to Keble's report; the anonymous case in *Winch*; and *Panton v. Isham*, are authorities for holding that a lease for a year, and so on from year to year, would confer a term for three years:

That Holt invariably adhered to the opinion, that it amounted to a demise for one year only; but that the lessee by entering on a second year was bound for that whole year; and so toties quoties; and that Lord Kenyon, in *Goodright dem. Richardson v. Hall*, entertained the same impression:

That the cases of *Bellasis v. Burbriche*, and *Stanfill*, or *Stanfitt, v. Hickes*, are authorities for the position, that a term for two years certain would pass; and are corroborated by the declaration of Lord Ellenborough, and (as that learned judge has assured us) of Mr. Justice Buller also; and also by the recent decisions in *Doe dem. Chadborn v. Green*, and *Regina v. The Inhabitants of Chawton*. The case of *Harris v. Evans*, being so differently reported, has not much claim to confidence either way.

On the whole, the weight of authority and reason appears to favor the conclusion that a term for two years certain will pass by such a lease.

So, a demise not for one year only, but from year to year, operates as a lease for two years at least (*p*). And, in like

(*p*) Denn dem. *Jacklin v. Cartright*, 4 East, 29.

manner, a lease for three years, and so from three years to three years, creates a term for six (*g*).

By a case in the 28th year of Henry the 8th (*r*), it appears that a parson leased his rectory "for a term of three years, and after the end of the three years to the end and term of other three years then next and immediately ensuing, and so after the end of the said three years to the end and term of other three years, during all the term of the natural life of the lessor;" and by the opinion of many benchers of the Middle Temple, and divers judges of C. B., the lessee took only an estate for nine years, if the lessor should so long live; for there wanted words to prove that he had an estate for the life of the lessor: but if it had run, "and so from three years to three years during the life," that, perhaps, would have enured otherwise (*s*). It was said also that if he had an estate in the rectory for the life of the parson, he ought to have had livery of seisin.

Another very similar case came before the court of K. B. in Hilary term, and again in Michaelmas term, in the 13th year of the reign of James the 1st (*t*). As Rolfe reports the case, it appears that a parson had made a lease of his tithes to J. S. for three years, and at the end of those three years for three more years, and so from three years to three years, during his (the lessor's) life; and that Coke was of opinion that it was a good lease for twelve years; "because, (he said), *for three years, and at the end of those three for three more*, amounted to six; *and so from three years to three years* amounted to six more." According to Bulstrode's report, in Michaelmas term, the words were, "for three years, and so from three years to three years, and so from three years to three years during his life;" and he states that the whole court were clearly of opinion, that it was a good lease for

(*g*) Co. Lit. 45, b. 1 Lev. 46.

(*r*) Anon. Dy. 24, a. pl. (151).

(*s*) And see Plowd. 522.

(*t*) Wrathbone v. Newbery, 3 Bulstr.

158; S. C., nom. Newberrie v. Rathbone, 1 Rol. 287; 1 Rol. Ab. 850, Estate, (A.) 1.

twelve years. And Doddridge, J., added :—" If he had said, *and so from the said three years for three years*, this had been a lease but for nine years.

Where a party took apartments "for twelve months certain, and six months' notice afterwards," Lord Ellenborough was clearly of opinion that he was at liberty to quit it at the end of the twelve months, on giving six months' previous notice. He thought that the word *certain*, applied to the first twelve months, showed that every thing afterwards was uncertain and depended on the notice (*u*).

(*u*) *Thompson v. Maberley*, 2 Campb. Green, 9 Adol. & Ell. 658. 661 ; S. C. 573. And see *Doe dem. Chadborn v.* 1 Per. & Dav. 454.

CHAPTER III.

AS TO LEASES FOR AN ABSOLUTE TERM OF YEARS.

PERHAPS the most usual mode of leasing in this country is for terms absolute. The ordinary husbandry lease is for twenty-one years (*a*). It is said (*b*), that at a very early period of our history leases for more than forty years were deemed bad; but this law, if it ever existed, was soon obsolete (*c*); yet even in the reign of Queen Elizabeth we find Lord Egerton pronouncing openly, that he would give none aid in Chancery for the maintenance of any perpetuities, nor of any lease for hundreds or thousands of years, made of lands holden *in capite*; because the latter were grounded upon fraud, and the former were fights against God (*d*).

The laws of our own day, except in particular instances (*e*), impose no restraint on the duration of leases (*f*), of course supposing them not to exceed the lessor's own estate in the property demised.

If a man lease his land for years, the lease is good for two years, being a number with which at least the plural will be satisfied (*g*).

A lease from hour to hour, or from month to month, or from year to year, during forty years, is a good lease for forty years (*h*). So, a lease for a year, and so from year to year till six years expire, is a certain lease for six years (*i*); and a

(*a*) Attorney-General *v.* Owen, 10 Ves. 560.

(*b*) Co. Lit. 45, b. 46, a. 1 Vent. 58.

(*c*) 2 Bla. Com. 142.

(*d*) Cary, 11. Risdén *v.* Tuffin, Toth. 187.

(*e*) As to restrictions in the case of leases by corporations ecclesiastical

and civil, See ante, p. 176, *et seq.*

(*f*) Browne *v.* Tighe, 8 Bli. P. C. N. S. 272. 298.

(*g*) Bishop of Bath's case, 6 Co. 35, b. 36, a.

(*h*) Plowd. 273. 522.

(*i*) Dod *v.* Monger, Holt, 416; S. C. 6 Mod. 215.

lease for a year, and so from year to year, as long as both parties agree, till six years expire, is also a lease for six years, determinable at every year's end at the will of either party (*k*).

Terms for years last during the whole anniversary of the day from which they are granted: if it were otherwise, the last day, on which rent is almost uniformly made payable, would be posterior to the lease (*l*).

In the case of *Hanbury v. Litchfield* (*m*), where the plaintiff contracted to take of the defendant a lease for thirty-one years of certain copyhold property, held of the manor of Ealing, of which holding the plaintiff had notice, and it appeared that, by the custom of the manor, the lord could not license a lease for more than twenty-one years, he was decreed to accept a legal lease for twenty-one years, with a covenant for a further term of ten years, and compensation for the difference in pecuniary value. The bill was framed with a view to a different relief, but as, upon the whole statement of it, such appeared to be the equity between the parties, the court, in order to avoid future litigation, made the decree accordingly, under the prayer for general relief.

(*k*) *Ibid.*

(*m*) *Hanbury v. Litchfield*, 2 Myl.

(*l*) *Ackland v. Lutley*, 9 Adol. & Ell. 879. 894; S. C. 1 Per. & Dav. 636. 647.

& Keen, 629.

CHAPTER IV.

AS TO LEASES FOR A TERM OF YEARS DETERMINABLE WITH
A LIFE OR LIVES, OR ON ANY OTHER EVENT.

LEASES for years determinable with a life or lives, or on any other event, are also of daily occurrence. They confer a chattel interest only; and it has been holden that a grant by a lessee for lives of all his estate and interest in the premises, habendum for ninety-nine years if the lives or any of them shall so long live, conveys not a freehold, but a term of years determinable with the interest of the lessor (*a*). On the same principle, a power of leasing for years determinable with a life will not authorise a lease for lives absolutely, under which a freehold interest must pass (*b*).

If a lease be granted for twenty-one years if C. so long live, and C. be dead at the time, the term is absolute (*c*). But if a lease be granted to B. if C. live for twenty-one years, and C. be dead at the time, the lease is void, for the condition is precedent (*d*).

If it be the intention that the lease should continue until the decease of the survivor of several cestuis que vie during the term, care should be taken to insert proper disjunctive words, as, "if A., B., and C., or the survivors or survivor of them, shall so long live;" for it is settled, that a lease for years if A. and B., or if A., B., and C. shall so long live, will determine by the death of one (*e*); though, according to Wil-

(*a*) *Earl of Derby v. Taylor*, 1 East, 502.

(*b*) *Evans v. Vaughan*, 4 Barn. & Cres. 261; *S. C.* 6 Dow. and Ry. 319.

(*c*) *Bradshaw's case*, 9 Co. 60, b;

S. C. Jenk. Cent. 305, case 79.

(*d*) *Jenk. Cent.* 305, case 79.

(*e*) *Brownl.* 30. 39. 292. *Brudnell's case*, 5 Co. 9, a. 1 Rol. 197. 3 Bulstr. 31. 1 Vent. 163. *Hughes v. Crowther*,

kinson's case (*f*), if the words be generally, if the lessees shall so long live, perchance it will be more doubtful.

Where a lease was made to A. and B. for one-and-twenty years, if the said A. and B., or any child or children betwixt them begotten, should live so long, it was decided that the death of B. within the term did not defeat it; for the disjunctive *or* before the word *child* made all the limitation in the disjunctive; and the lease was held to endure so long as any of the persons named in the proviso should live (*g*).

If it be intended that the term should cease on the happening of the first or last of several events, the words used to denote the period of determination must be clear and unambiguous.

A substantial difference exists between a lease to A. and B. for sixty years if they shall so long live, where the lives are merely collateral to the estate for years, and a lease to one for the lives of A. and B. In the latter case, the freehold does not determine by the death of one of them, but the lessee has an estate by way of limitation during the lives of two persons, and, by construction of law, during the life of the survivor of them (*h*). To determine the lease on the death of one, the habendum should be for the *joint* lives of A. and B.

Where a house was demised to a widow for forty years, "upon condition that if she should so long continue a widow, and should dwell in the said house"; and she continued a widow, and lived in the house till her death, which occurred within the forty years; it was doubted whether her executor,

13 Co. 66; S. C. Brownl. & Gold. 180. Bailes v. Wenman, 2 Vent. 74. Daniel v. Waddington, Cro. Jac. 377; S. C. 1 Rol. 309; 3 Bulstr. 130. Lessee Newton v. Byrne, cited, 1 Crawf. & Dix, 555.

(*f*) Wilkinson's case, Hetl. 76.

(*g*) Baldwin v. Cocke, or Coke, or Cooke, sometimes cited as Truepenny's case, 1 Leon. 74; S. C. 1 And. 161; Mo. 239; Cro. Eliz. 270; 2 Bulstr. 131;

Ow. 52; Gouldsb. 71. Anon. Jenk. Cent. 279, case 1. Co. Lit. 225, a.

(*h*) Brudnell's case, 5 Co. 9, a. 1 Rol. 197. 3 Bulstr. 31. 1 Vent. 163. Hughes v. Crowther, 13 Co. 66; S. C. Brownl. & Gold. 180. Anon. 1 And. 151, case 199. 1 Brownl. 30. 39. 292. Fitzpatrick v. Hawkesworth, 1 Crawf. & Dix, 554. And see Hills v. Hills, Mo. 376. 1 Vent. 163.

or the reversioner, was entitled to the residue of the term. Popham, C. J., Gawdy, and Clench, held that the words "upon condition that if", having no corresponding conclusion, so as to render the sentence complete, were insensible, and amounted to neither a condition nor a limitation. But they agreed, that had the lease been to her for forty years if she should so long continue unmarried, and should inhabit the house, it would have determined either by her marriage or death (*i*). And Popham noticed a distinction between a lease of a house for forty years, if the lessee should dwell in the same for his life, and a lease for forty years, if he should dwell there during the term; the term, in the former case, continuing till its expiration by effluxion of time, notwithstanding the lessee's death, if he performed the condition of residence; but ceasing, in the latter, on the lessee's decease (*k*).

In a later case (*l*), a lease was made for twenty-one years, if the lessee should so long live, and continue in the lessor's service. The lessor died; and Anderson, Owen, and Glanville held that the lease continued; for the cesser of the service was occasioned by the act of God, and not attributable to any laches on the part of the lessee. But Walmsley was strongly opposed to this construction, considering that the continuance of the lease was limited by the duration of the service. Croke concludes his report with a *quære*.

A tenancy for ninety-nine years determinable on lives is not a holding "for any term or number of years certain, or from year to year", within the act (*m*) for enabling landlords more speedily to recover possession of lands and tenements unlawfully held over by tenants (*n*).

(*i*) *Hardy v. Seyer*, Cro. Eliz. 414; S. C., nom. *Sawer v. Hardy*, Ow. 107; S. C., nom. *Sawyer v. Hardy*, Poph. 99; S. C., nom. *Sayer v. Hardy*, Gouldsb. 179; 1 Rol. Ab. 410, Condition, (H). 1. And see *Doe dem. Lockwood v. Clarke*, 3 East, 135.

(*k*) Poph. 99.

(*l*) *Wrenford v. Gyles*, Cro. Eliz. 643; S. C., nom. *Wrenford v. Giles*, Noy, 70. And see *Wroth's case*, Plowd. 454.

(*m*) 1 Geo. 4. c. 37.

(*n*) *Doe dem. Pemberton v. Roe*, 7 Barn. and Cres. 2.

CHAPTER V.

AS TO LEASES FOR A TERM WITH THE GRANT OF AN
ACCESSIONAL TERM ON AN EVENT.

IN the early reports, we sometimes meet with cases where the lessee is to take an accessional term on some specified event. Thus, a lease granted to H. for eighty-one years if B. should so long live, and from and after the day of the death of B. for 31 years, was held by Bridgman, C. J., to constitute but one entire term, and not a remainder or future interest (*a*).

In another case (*b*), a lease for life, with a proviso that if the lessee should die before the end of sixty years thence next ensuing his executors should enjoy the land, as in title and right of the lessee, for the term of so many years as should amount to the entire number of sixty years, to be computed from the date of the indenture, was held not to constitute a lease for years in the lessee, nor a remainder in his executors, because nothing of the said term was limited to the lessee for life, so as to enure as a remainder to him and his executors.

The subject was much discussed in the case of *Spark v. Spark*, which was presented to the court in three several shapes; first, upon demurrer in an action of trespass; secondly, as a special verdict on an ejectment; and, thirdly, upon demurrer in an action of debt; but it is not easy to collect the exact terms of the grant or demise on which the question

(*a*) *Hennings v. Brabason*, 1 Lev. 45; S. C. 1 Keb. 154; S. C., nom. *Hemming v. Brabason*, O. Bridgm. by Bamm. 1, a very full report.

(*b*) *Gravenor v. Parker*, 1 And. 19, case 38; S. C. *Parker v. Gravenor*,

2 Dy. 150, a.; S. C., nom. *Granew v. Parker*, Benl. 72. pl. 115. And see *Kirke v. Bails*, 1 And. 19, case 39; S. C. Mo. 100; S. C., nom. *Kyrke v. Bales*, Bendl. 41; S. C., nom. *Craumer's case*, 3 Dy. 309, a.; 2 Leon. 5; 3 Leon. 20.

arose. As it is first reported by Croke (*c*), it appears, that a lease for life was made to J. D. by indenture; and that afterwards by another indenture, he [*i.e.*, the lessor] (*d*), let it to J. S. for ninety-nine years after the expiration or determination of the first lease, *si tam diu vixerit*; “and further granted to J. S., survivor of them, that after the death of the survivor of the said J. S. [and J. D.] (*d*) the lands should remain to the executors of J. S. for twenty-one years;” that J. D. died, and after him J. S. died intestate; and whether his administrator should have the term, or whether it ought to have vested in the executor as a purchase, and not in the testator, was the sole question; but no opinion was given on the point on account of some exception taken to the pleadings.

When next it came before the court, the case was stated thus (*e*):—Nicholas Spark, seised in fee, by indenture let it to W. S. for eighty years if he live so long, “the remainder after his decease to the executors *or assigns* of the said W. S. for forty years.” W. S. died intestate, and his wife took letters of administration; and the question was, whether the remainder for forty years vested in W. S., or if it failed because he had not made any executor. And all the justices delivered their opinions severally, that the term vested in W. S.; that the plaintiff should have it as administratrix; and that it should be assets in her hands; for the intention of the lessor appeared that the executors or assigns of W. S. should have it; so by the word *assigns* was intended that W. S. might dispose and make an assignment thereof, and, therefore, that it vested in him, and should go to his executors or administrators as assigns in law, and as a thing which came unto them from their testator, and not as a perquisite by themselves. And Walmsley said, that it never yet was questioned by any that if these two terms had been in one clause, but that they should have vested in W. S., as if it had been habendum for eighty years if he should live so long, and for forty years

(*c*) Spark *v.* Spark, Cro. Eliz. 658.
Pasch. 41 Eliz.

not in the report.

(*e*) Cro. Eliz. 666. Pasch. 41 Eliz.

(*d*) The words within brackets are

after his decease to his executors ; and Croke states that it was afterwards adjudged accordingly.

The point, however, was again agitated, Trin. 43 Eliz. (*f*), when it appeared that :—one Robert Spark was seised in fee, and let it by indenture to W. J. for life, and afterwards by another indenture let it to W. S., the intestate, for ninety-nine years if he should live so long, to begin after the death of W. J. ; “and further by the same deed *vult et concedit* that after the decease of the survivor of the said W. J. and W. S., or other determination of the said estates, the said land should remain to the executors and assigns of W. S. for forty years ; that afterwards W. J. died ; that W. S. entered, and let it to the defendant for years, to begin after his death, and died ; and that for rent in arrear the plaintiff brought the action. The same question arose ; but the court did not deliver any opinion certainly therein, because none was there to argue on the defendant’s part ; yet they all agreed that if the case were, as it was put at the first, that the lease was made to W. S. for ninety-nine years, if he lived so long, and if he died within the term that it should be to his executors and assigns for forty years, the term for forty years would not vest in W. S., but in his executors by purchase, because it was a conditional limitation, and a mere possibility to vest ; for there was a condition precedent that it should not be a lease, unless he died within the term, which peradventure should not be, for he might survive the term. The case, however, was adjourned.

Although no further mention of it is made by Croke, it came again before the court, Mich. 44 & 45 Eliz., and is reported by Yelverton (*g*) and Moore (*h*). According to the former, a man made a lease for life, and afterwards demised to A. for ninety-nine years, if he should so long live, to commence after the death of the tenant for life, “and if A. died during the term of ninety-nine years, or that the term otherwise determined, and after the death of the lessee for life,

(*f*) Cro. Eliz. 840.(*g*) Yelv. 9.(*h*) Mo. 666.

then the lessor granted for himself and his heirs that the land should remain to the executors of A. for twenty years;" the lessee for life died; A. demised for twenty years, yielding rent, and died intestate; B. took administration, and brought debt for the rent, and it was held that the action would not lie; for Gawdy and Yelverton conceived that the contingent lease of the twenty years never vested in A., but that if he had made executors they should take by way of purchase, executors being a name of purchase; but Popham and Fenner, agreeing for the matter in law as to the action of debt, conceived that the executors of A. should never take, for the estate ended before the interest commenced or arose to the executors.

Moore's report (*i*) of the terms of the demise corresponds, in effect, though not in exact words, with Yelverton's; and he states that it was adjudged that the action would not lie, because the executors and assigns were to take by purchase the term of twenty years, and the term was never in the intestate himself to grant or dispose of, and the administrator should not take a thing limited in purchase to the executor.

Noy's report of the case (*k*) is but a brief note, and throws no light on the subject.

The conflict of opinion among the judges may, perhaps, be ascribed to the circumstance of the demise being presented to the court in different terms.

But it is now settled, contrary to the current of ancient authorities (*l*), that a lease from A. to B. for ninety-nine years if he should so long live, and after his death, if he happen to die within the said term, or other end or determination of the said term, the remainder thereof to C. for and during the residue of the said term, vests in C. as many of the ninety-nine years as are unexpired at B.'s death; for the

(*i*) Mo. 666.

(*k*) Noy, 32. Tr. 43 Eliz.

(*l*) Cecil's case, 3 Dy. 253, b. Green v. Edwards, Cro. Eliz. 216; S. C. Mo. 297; 1 And. 258; 1 Leon. 218. Anon.

Mo. 247, pl. 388. 1 Bulstr. 193. Shep. Touch. 274; and the Rector of Chedington's case, 1 Co. 153; S. C., nom. Lloyd v. Wilkinson, Mo. 478.

word *term* in legal signification may mean not only the estate and interest which passes for that time, but also the limits and limitation of time; and as the acceptance of that word in the former sense would frustrate, while in the latter it would promote, the evident intention of the parties, the courts will construe the word liberally, *ut res magis valeat quàm pereat*, and so continue the term to C. after the death of B. (*m*).

The means provided for remedying the inconveniences occasioned by want of proof of the decease of persons upon whose lives estates depend will be noticed at the end of the next chapter.

(*m*) Wright, or Right, dem. Plowden *v.* Cartwright, 1 Burr. 282; S. C. 1 Ken. 529. Co. Lit. 45, b. And see

Evans *v.* Vaughan, 4 Barn. & Cres. 261-8; S. C. 6 Dow. & Ry. 349.

CHAPTER VI.

AS TO LEASES FOR LIVES.

BETWEEN leases for years and leases for a life or lives there are many important points of distinction, which relate as well to the intrinsic nature of the estate or interest itself, as to the mode of its creation and means of determination.

The circumstance of a lease for life conferring a freehold is the principal characteristic distinguishing it from a lease for years, by which, as we have seen (*a*), the lessee takes only a chattel interest.

Another point of distinction is, that it cannot be made to commence *in futuro*, supposing the estate to be granted by a common law lease, and not by an instrument operating under the statute of uses (*b*), or by way of use under the late act of 8 & 9 Vict. c. 106 (*c*), on account of the necessity of its being accompanied or perfected by livery of seisin (*d*), respecting which a few remarks will be found towards the conclusion of this chapter.

Neither can it be created by parol (*e*), as some chattel leasehold interests may (*f*).

The right of the lessee or his representatives to the emblements, on the determination of the tenancy, is another feature of distinction between a lease for life and a lease for a term of years absolute.

(*a*) Ante, p. 3.

(*b*) The Earl of Leicester's case, 1 Vent. 278. 281, paged by mistake 291. Bayley v. Warburton, Com. 494-7.

(*c*) This will be more fully noticed in the chapter which treats of the Instrument of demise, post, Part the Fifth,

Chap. I.

(*d*) Barwick's case, 5 Co. 93, b. 94, a.

(*e*) 8 East, 166.

(*f*) See the statute of frauds, 29 Car. 2. c. 3. And post, Part the Fifth, Chap. 1.

A lease for a life or lives may be granted to one person, or to several persons; and where granted to several, the term may be made to endure for their joint lives, or for the lives and life of the survivors and survivor; or the lessees may be made to take beneficially in succession; or the estate may be held for the life or lives of a stranger or of strangers alone, or as joint cestuis que vie with the lessee or lessees. In fact, the modifications of holding are almost endless.

The habendum of a lease for the lessee's life is usually to him and his assigns for and during the term of his natural life; though less formal words may be equally efficacious. Thus, a demise from day to day, or from week to week, or from month to month, or from year to year, during the life of the lessee, accompanied with livery, or, if made since the late statute of 7 & 8 Vict. c. 76 (*g*), without livery, will amount to a good lease for life (*h*). And, according to Dyer (*i*), a similar interest passed by a demise for three years, and so from three years to three years during the life of the lessee, if livery were given; but where a lease, unaccompanied with livery, was made by a parson of his rectory to one for three years, and so from three years to three years, and so from three years to three years, during his life, it was held to create an interest for twelve years (*k*). But this, it is submitted, is altered, as to the livery, by the acts just referred to.

If a tenant in fee-simple make a lease to A. for life, without mentioning whose life, or using any words of explanation or qualification, the lessee's will be the life intended, on the principle of construing the grant most strongly against the lessor (*l*).

(*g*) 7 & 8 Vict. c. 76. This act, which provided (sect. 2,) for the conveyance of freeholds by deed without livery of seisin, was repealed in this respect by 8 & 9 Vict. c. 106, s. 1, as from the 1st of October, 1845; and the latter act provided, (sect. 2,) that after that day, all corporeal tenements and hereditaments, shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as

well as livery.

(*h*) Plowd. 522. And see Plowd. 273.

(*i*) Anon. Dy. 24, a. pl. (151).

(*k*) Wrathbone v. Newbery, 3 Bulstr. 153; S. C. nom. Newberrie v. Rathbone, 1 Rol. 287. Plowd. 273.

(*l*) Co. Lit. 42, a. Smith & Doe dem. Jersey, 7 Pri. 453. Doe dem. Pritchard v. Dodd, 5 Barn. & Adol. 689; S. C. 2 Nev. & Man. 338.

But if tenant in tail made such a lease before the passing of the act for the abolition of fines and recoveries (*m*), the lessor's life was the one intended; for a different construction might have worked a wrong by creating a discontinuance (*n*). It is submitted, however, that such a lease now made by a tenant in tail, in conformity with the provisions of the act referred to (*o*), would pass an estate for the life of the lessee.

Even in the case of a tenant in fee-simple, though a demise, in the granting part of a lease, to one for the term of *his* natural life, be *prima facie* for the life of the lessee, yet other parts of the instrument may be received in evidence to indicate the life referred to by the word *his*. Thus, where A. demised certain premises to B., his executors, administrators, and assigns, habendum to the said B., his executors, administrators, and assigns, for and during the term of his natural life; and the lease contained a covenant by B., at the end of the said term, or other sooner determination of the lease by the death of the said A., or otherwise, to yield up the premises; and a covenant by A. for quiet enjoyment by the lessee, his executors, administrators, and assigns, during the natural life of A., the court held, that the lease must be taken to have been granted for the life of A., and not of the party whose executors and administrators were included with himself in the grant (*p*).

When it is intended that a lease to two or more persons shall determine on the death of either, the grant should be for their *joint* lives.

But where the interest is to continue with the survivor, it is sufficient to grant it to them generally for their lives, without inserting words of survivorship, which, however, are perfectly harmless (*q*); and, on the death of either, the entire estate will survive to the other (*r*). But if the lease be

(*m*) 3 & 4 W. 4. c. 74.

(*n*) Co. Lit. 42, a. Discontinuance was in effect abolished by the late statute of limitations, 3 & 4 W. 4. c. 27. s. 39. For the law respecting leases by Tenants in tail, see ante, p. 65.

(*o*) 3 & 4 W. 4. c. 74.

(*p*) Doe dem. Pritchard v. Dodd, 5 Barn. & Adol. 639; S.C. 2 Nev. & Man. 838.

(*q*) 4 Co. 63, b.

(*r*) Brudnell's case, 5 Co. 9, a. Anon. 1 And. 151, case 199. 1 Brownl. & Gold. 30. And see Newman v. Dan-

granted for a certain term of years if the lessees shall so long live, the interest will determine by the death of one.

Where a lease is made to two for their lives, they should cautiously abstain from making partition, the effect of which is to constitute each of them tenant for his own life of his own moiety, and thus defeat the possibility of his taking the other moiety by survivorship. On the death of either, his share will revert to the lessor(s). If, instead of being tenants for their lives, the lessees hold for years, with a proviso determining the lease on their deaths within the term, and they make partition, on the death of either, his assignee, or executors, as the case may be, will be entitled to his share during the life of the survivor (t).

Where an agreement was entered into in the following terms:—"Agreed this day to let to Mr. Smith my house, situate in the Wardwicke, Derby, at the yearly rent of thirty guineas, he paying the taxes; also an inclosure called the Gallows Intack, at the yearly rent of 7*l.*: the above agreement to continue during my life, supposing it to be occupied by himself or a tenant agreeable to me: a clause to be added in the lease to give my son a power to take the house for himself, if he chooses, when he comes of age:" and a question arose, what interest the tenant was entitled to under it; the court said, that it would be a lease for the joint lives of the lessor and lessee, with proper covenants to restrain him from parting with the personal occupation of the premises during his life, without her consent: that the first material words "that the agreement is to continue during my life" imported that the term could in no event exceed the lessor's life; and that the words "supposing it to be occupied by himself, or a tenant agreeable to me" were words of condition requiring the lessee either personally to occupy the premises, or to occupy them by some other tenant agreeable to the lessor, still

age's case, 1 Dy. 46, a. 30 Ass. 8.
Fitzpatrick v. Hawkesworth, 1 Crawf.
& Dix, 554. The words *during their*
joint and natural lives, in a settlement,
held to mean, *during their joint lives*,

and the life of each. Smith v. Oakes,
14 Sim. 122.

(s) 4 Co. 73, b. 30 Ass. 8.

(t) Farington's case, 1 Dy. 67, a.
pl. (18).

regarding it, however, as in effect the occupation of the lessee himself; that his interest, therefore, ended with his life; and, as he continued in possession to the last upon the terms of the agreement, the court could not refer his possession to any other title, and consequently held, that an ejectment was well brought against his executrix upon his death without giving her any notice to quit (*u*).

In a late case (*x*), J. C., by indenture, dated 29th Sept. 1779, duly enrolled, between himself of the one part, and Mary Edwards of the other part, demised certain premises to the said Mary Edwards, to hold the same to her and her heirs "for and during the natural lives of the said Mary's son, John Edwards, her daughter, Martha Edwards, and Alexander Edwards's grand-daughter, and the life of the survivor of them." Alexander was a son of Mary: he never had a grand-daughter prior to, nor at the time of making the indenture, but he had a daughter Elizabeth and two other children then living, and Elizabeth had a daughter in 1797; and since that time, and during the lives of John and Martha, two of the cestuis que vie named in the lease, Alexander had twelve other grand-daughters, all of whom were living at the time of the trial; Martha died in 1830, and John in 1835; and the question was, whether the estate created by the lease was or was not determined by the death of John. The defendant contended that the lease was to endure for the life of Alexander's first daughter who should come *in esse* after the making of the lease, or any grand-daughter living at the death of the two other cestuis que vie named, and, consequently, that it did not determine on the death of John Edwards. The court said, that the only doubt was whether any estate passed at all; but, being bound to construe the lease most strongly against the grantor, they ought to hold that it did pass some estate, but that they could not engraft upon the words of the limitation the name of a person not

(*u*) Doc dem. Bromfield *v.* Smith, 1 Mees. & Wel. 553; S. C. 1 Tyrw. & 6 East, 530; S. C. 2 Smith, 570. Gr. 1006; 2 Gale, 137.

(*x*) Doc dem. Pemberton *v.* Edwards,

then in existence; and it was held, that the estate was good for the two lives, but not for that not in existence at the time the lease was granted.

Until lately, if a lease were made by indenture *inter partes*, several persons could not take as joint lessees for lives unless they were all named parties to the deed (*y*); but this has been altered in some respects by two recent acts. The former (*z*) provided (*a*), that any person not being a party to any deed might take an immediate benefit under it, in the same manner as he might under a deed-poll; but did not extend to leases made before the 1st of January, 1845 (*b*); and at best it was open to much objection, by its referring to a deed-poll as the apparent standard for measuring the amount of benefit taken by the person not party to the deed, as it precluded him from taking advantage of an estoppel, which, as we have seen (*c*), can only arise in cases where an *indenture* is adopted. But the provision has since been repealed by the statute of 8 & 9 Vict. c. 106 (*d*), which enacted (*e*), that, under an indenture executed after the 1st of October, 1845, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture. The old law, therefore, must be applied to cases where the lease was made previously to 1845.

The lessees are sometimes appointed to take successively in the order in which their names occur in the demise; as where a lease was made to R. G., “habendum to him and Joan his wife for their lives, *et eorum diutius viventi successivè uni post alterum sicut scribuntur et nominantur in ordine*”; this was held to be a good remainder to Joan (*f*).

It appears to be immaterial whether all the lessees, or one

(*y*) *Windsmore v. Hobart*, Hob. 313. *Kirkman v. Reignold*, 2 Leon. 1. *Anon.*, 3 Leon. 34.

(*z*) 7 & 8 Vict. c. 77, “An act to simplify the transfer of property.”

(*a*) Sect. 11.

(*b*) Sect. 13.

(*c*) *Ante*, p. 55.

(*d*) 8 & 9 Vict. c. 106, “An act to amend the law of real property.”

(*e*) Sect. 5.

(*f*) *Wheaton v. Sugg*, Cro. Jac. 372.

of them only, be named in the premises, if the habendum sever their interests by giving successive estates for life. Accordingly, if land be leased to three by the premises, with an habendum to one for life, remainder to another for life, remainder to the third for life, they will take in succession, and not as joint-tenants (*g*).

A similar case is to be found in Moore's Reports (*h*). A lease was made to three persons, habendum to them and to the survivor of them in manner and form following, viz., to one for life, remainder to the other for life, remainder to the third for life; Brown thought that the habendum was void, and that the lessees were joint-tenants; but Dyer and Weston held, that this did not confer a joint tenancy on the lessees, but that they took by way of remainder.

So, where a lease was made to a mother and son, habendum to them for the term of their lives, and the life of the longest liver of them, successively to one of them after the other, as was directed in the indenture, and not jointly, the court held, that the entire freehold was in the mother only, with the remainder to the son, and not in both jointly (*i*).

In one of the early cases above cited (*k*), Weston said, that by custom in the west country a lease to three, habendum *successivé* should enure by way of remainder, the lessees taking in priority as they were named in the lease.

But, in the absence of custom, to enable the lessees to take in this manner, the order of succession must be clearly ascertainable from the terms of the deed. In *Windsmore v. Hobart* (*l*) above quoted, a leading case on this subject, it appears, that by indenture between Lord Sturton and Thomas Hobart, the former demised to the said Thomas Hobart certain premises, to hold to the said Thomas Hobart, and Nicholas, John, and Henry Hobart, his sons, for the term of their lives, and the

(*g*) Anon. Dy. 160, b. pl. (43).
Plowd. 153, a. *cont.* cannot be relied
on.

(*h*) Anon. Mo. 26. pl. 87.

(*i*) Anon. 3 Dy. 361, a. pl. (8).

(*k*) Anon. Mo. 26. pl. 87

(*l*) *Windsmore, or Winsmore, v.*
Hobart, Hob. 313; Hutt. 87; S. C. nom.
Windsmore v. Hubbard, Cro. Eliz. 57;
Ow. 138; S. C. nom. *Windsmore v.*
Hulbord, Godb. 51; cited, Cro. Jac.
564.

life of the survivor of them, successively; and the court was clearly of opinion, 1st, that the sons, not being parties to the deed, could not take in possession; 2ndly, that they could not take jointly by way of remainder, because of the word *successivé*; and, 3rdly, that they could not take in succession, for the uncertainty who should begin, and who should follow (*m*).

The like point was raised in the case of *Greenwood v. Tyber*, or *Tyler* (*n*). There, by indenture between Arthur Long and Alice his wife of the one part, and John Fisher of the other part, the premises in question were demised to the said John Fisher, and Anne his wife, and Joan their daughter, habendum to them, *ut supradictum est, et eorum diutius viventi successivé*, from Michaelmas following, for the term of their lives, rendering annually during their lives, *ut supradictum est*, 13s. 4d. at the two usual feasts, and a heriot after the death of every of them. After agreeing that Anne and Joan could not take as joint-tenants with John Fisher, on account of their being omitted as parties to the indenture, the court resolved, that they should take by way of remainder the one after the other, and as if the clause had been in the deed, *sicut nominantur in chartá*, as Dy. 361 (*o*); for, unless they should take in that way, the deed would be void as to

(*m*) And see *Mo. 26. pl. 87*; and *Owen v. App Rees*, *Cro. Car. 94*; *S. C. nom. Owen v. Price*, *Heil. 22*. *Anon. Mo. 8. pl. 32*. *Bro. Ab. Leases, pl. 54*. *B. N. C. 127*, the second page of that number, tit. *Joyntenants*. The paging of *B. N. C.* is very faulty throughout.

(*n*) *Greenwood v. Tyber*, *Cro. Jac. 563*; *S. C. Hob. 314*, *nom. Greenwood v. Tyler*. *Hobart* gives the habendum in these terms:—"Habend. les dits tenements al John Fisher et Anne sa femme et Johan leur file et eorum diutius viven. successivé a festo S. Michaelis Archangeli, donque prochain ensuant le date del dit indenture usque le fine et terme de leur vies naturall, redant proinde annuatim durant. vitis suis ut prædict. est le yearly rent de 13s. 4d., ovesque un harriot de leur

best animal post eorum decessum sive exitum, Anglicé, going out, cujuslibet eorum: ove covenant de part John Fisher et sa femme et Johanne leur file de payer touts free rents et autres charges and duties issuant hors de ceste terre durant leur vies ut profertur apres le feast d. S. Michael avant dit."

Palmer, who reports the case, p. 29, *nom. Tyler v. Fisher & Greenwood*, gives the habendum thus:—"Habendum al eux et diutius viventium pur leur vies successive del jour de S. Mich. proch. ensuant le jour apres Mich."; but makes no mention of the words, *ut supradictum est*, on which, according to *Croke*, so much stress seems to have been laid by the judges of the King's Bench.

(*o*) *Noticed sup. p. 684.*

them, which the law would not permit, if by any means or construction it could be made good: that by this construction, that the husband first should have it, and afterwards the feme, and afterwards the daughter, every part of the deed would stand and be good; and that this was enforced by the words *ut supradictum est*, which was as if they had been named. They said also that the case was distinguishable from *Windsmore v. Hobart* (*p*), principally on the ground that the latter did not show which of the brothers should take before the other; while in the principal case, the first part of the deed, and not the habendum only, showed that they should all take; that the limitation *ut supradictum est* showed that the lessor intended such one after the other; that the reservation of the rent and heriot, *ut supradictum est*, showed that the one after the other should pay the rent and heriot; that the limitation was, *et eorum diutius vivent. successivé, et vivent. successivé* (*q*), for the term of their lives; the *successivé* being before the limitation for all their lives; that in the other case (*Windsmore v. Hobart*) the limitation was to them for the term of their lives, and then the *successivé* did not divide it; therefore it much differed from the said case. And it was adjudged that the lease in question was good by way of remainder. But a writ of error being brought in the Exchequer Chamber, the matter was ultimately settled by compromise; but not before the judges there had intimated their opinion that there was no material difference between *Windsmore v. Hobart* and the principal case, so that the judgments could not stand both together.

Remainder-men may thus take in succession, though they be not parties to the indenture of demise (*r*); in which respect they differ from joint lessees for lives, in cases not affected by the late acts above referred to.

Where, in consequence of their not being named parties to the indenture, persons cannot take as joint-tenants with the

(*p*) Ante, p. 684.

(*q*) So in Cro. Jac. 564, though it seems that the words *et vivent. successivé*

are repeated by mistake.

(*r*) *Windsmore v. Hobart*, sup. *Greenwood v. Tyber*, sup.

lessee named a party; and where, in consequence of the construction of the instrument, they cannot take in remainder, their lives will form no part of the limitation of the estate; but the lessee, party to the deed, will hold for his own life only (s).

Leases are frequently made for the lives of the lessees themselves and of persons strangers to the lease. These are good limitations, and create an interest for all the lives named. Thus, if a lease be made to one for his own life and the lives of two others, the interest will endure for the three lives; and although the lessee cannot in his own person have any benefit beyond his own life, yet he may grant it to another; and his underlessee, or assignee, may enjoy the premises after his death (t).

It is a common practice to grant leases for the lives of persons unconnected alike with the estate or contracting parties; and the interest may be made to determine, as in the case of several lessees, on the death of one, or to continue until the decease of the survivor of the *cestuis que vie*. If it be granted for the lives of two or more persons, it will endure until the death of the survivor, without words expressive of its continuance during the life of the survivor; for the lessee has an estate of freehold by way of limitation during the lives of the *cestuis que vie*, and, by construction of law, during the life of the survivor (u). But a lease for 100 years if two or more persons shall so long live, will determine by the death of one; the lease in that case being conditional, and not determinable by limitation of estate, and the lives being collateral to the lease, which is but a chattel (x).

A lease *pur autre vie* confers an estate of freehold simply, and not a freehold of inheritance (y). The heir may take as

(s) *Kirkman v. Reigold*, 2 Leon. 1.

(t) *Roos v. Adwick*, Cro. Eliz. 491;
S. C. nom. *Rosse's case*, 5 Co. 13, a;
S. C. nom. *Roos v. Adwick*, Mo. 398;
S. C. nom. *Rosse v. Adwick*, Gouldsb.
157. *Uttly Dale's case*, Cro. Eliz. 182.
And see *Anon.* Mo. 8. pl. 32. *Hills v.*
Hills, Mo. 876.

(u) *Brudnell's case*, 5 Co. 9, a.

(x) *Ibid.*

(y) *Grey v. Mannoek*, 2 Ed. 339;
cited, 6 Term Rep. 292. *Doe dem.*
Blake v. Luxton, 6 Term Rep. 289.
Low v. Burron, 3 P. Wms. 262; S. C.
2 Eq. Ca. Ab. 394. pl. 1. *Baker v.*
Bayley, 2 Vern. 225.

special occupant, and hence the term *descendible freehold* has, with no great propriety perhaps, been applied to it; for it must be remembered that he does not succeed to the possession on any principle of inheritance, but simply by being specially designated in the lease as the successor of the lessee (*z*). An interest of this kind confers no title to dower (*a*); nor is it within the statute *De donis* (*b*).

But if a lease be made to a man and his heirs, during three lives, of lands in borough-English, the freehold will devolve on the youngest son, though it be a newly created estate; because the custom is so annexed to the land as to affect that estate (*c*).

Sometimes the demise *pur autre vie* is to the lessee his heirs and assigns; sometimes, to him, his executors, administrators, and assigns.

At common law, where the grant was to the lessee *pur autre vie*, without naming some one to succeed him, any person, after his death, might enter on the vacant possession, and enjoy the estate, as general occupant, until the death of the survivor of the *cestuis que vie* (*d*).

By making the grant to the lessee, his heirs and assigns, the heir succeeded as special occupant.

Whether the executor or administrator could take as special occupant has been the subject of some diversity of opinion, authorities of eminence being found on each side. Lord Hardwicke (*e*) and Lord Eldon (*f*) considered that they could; but Lord Redesdale thought otherwise, and referred to the statute of frauds, which, he said, seemed to have supposed that there could be no special occupant to take on the death of a person holding *pur autre vie*, except his

(*z*) Ibid. Ripley *v.* Waterworth, 7 Ves. 437-8. And see 7 Ves. 443.

(*a*) Low *v.* Burron, sup.

(*b*) Baker *v.* Bayley, sup. Low *v.* Burron, sup.

(*c*) Baxter *v.* Dondswell, or Dowdswell, 2 Lev. 133; S. C. 3 Keb. 475. Townsend's case, cited, 2 Ld. Raym. 1023. Clements *v.* Scudamore, Salk.

243. Baker *v.* Bayley, 2 Vern. 225-6.

(*d*) Co. Lit. 41, b.

(*e*) Duke of Marlborough *v.* Lord Godolphin, 2 Ves. 61, 80. Williams *v.* Jekyl, Elliot *v.* Jekyl, 2 Ves. 681. Westfaling *v.* Westfaling, 3 Atk. 460, 466.

(*f*) Ripley *v.* Waterworth, 7 Ves. 425. Milner *v.* Lord Harewood, 13 Ves. 273.

heir (*g*). The better opinion, however, appears to be, that executors or administrators can take as special occupants things lying in livery; but not such as lie in grant, the latter being incapable of occupation, and the freehold in the former never devolving on them in their representative capacity (*h*).

The practical importance of the question, as far as it relates to our subject, was superseded by the statute of frauds (*i*), which provided (*k*), that from thenceforth any estate pur autre vie should be devisable by a will in writing, with certain formalities; and if no such devise thereof should be made, the same should be chargeable in the hands of the heir, if it should come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee-simple; and that in case there should be no special occupant thereof, it should go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and should be assets in their hands.

Still, as in cases where no devise was made of such estates, it was questionable to whom the surplus, after payment of the debts of the deceased owner, would belong, it was afterwards enacted (*l*), that such estates pur autre vie, in case there should be no special occupant thereof, of which no devise should have been made according to the said act for prevention of frauds and perjuries, or so much thereof as should not have been so devised, should go, be applied, and distributed, in the same manner as the personal estate of the testator or intestate.

(*g*) *Campbell v. Sandys*, 1 Scho. & Lef. 233. His Lordship referred to Rol. Ab. Occupant, G. 2, and 3 Dy. 323, b. pl. (10). Lord Windsor's case, 3 Leon. 35, semb. S. C. Com. Dig. Estates, F. 1. *Salter v. Butler*, Cro. Eliz. 901; S. C. Yelv. 9; Noy, 46; S. C. nom. *Salter v. Boteler*, Mo. 664.

(*h*) Bac. Ab. Estate for Life and Occupancy, [B]. 3. And see *Savery v. Dyer*, Ambh. 140; S. C. 1 Dick. 162.

Butl. n. to Co. Lit. Index, tit. Dower, in 13th Ed. fol., A.D. 1783. Hargr. Co. Lit. 41, b. n. (4). And a valuable note, Sugd. Pow. 6th Ed. Vol. i., p. 245. *St. John's College v. Fleming*, 2 Vern. 320; S. C. 1 Eq. Ca. Ab. 275. pl. 12; and Raithby's note to Vern. 3 P. Wms. 264, n. [D]. 6th Ed.

(*i*) 29 Car. 2. c. 3.

(*k*) Sect. 12.

(*l*) 14 Geo. 2. c. 20. s. 9.

Previously to this statute, the administrator took the surplus for his own benefit as a general occupant (*m*).

Further provision has been made upon the subject by the late act for the amendment of the laws with respect to wills (*n*); the second section of which repeals (among other matters) so much of the statute of frauds as related to the devise of any estate pur autre vie, or to any such estate being assets; and also so much of the act of 14 Geo. 2. c. 20, as related to estates pur autre vie, except so far as the same acts or either of them related to any wills or estates pur autre vie to which the act now under notice does not extend.

After enabling (*o*) persons to dispose of their real and personal estate by will, and declaring that the power thereby given shall extend to estates pur autre vie, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament, it was further enacted (*p*), that if no disposition by will shall be made of any estate pur autre vie of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee-simple; and in case there shall be no special occupant of any estate pur autre vie, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

<p>(<i>m</i>) <i>Oldham v. Pickering</i>, 12 Mod. 103; S. C. 2 Salk. 464; <i>Carth.</i> 376; <i>Comb.</i> 388. 475; <i>Holt</i>, 503; S. C. nom. <i>Olderoon v. Pickering</i>, 1 Ld. Raym. 96; S. C. nom. <i>Oldison v. Pickering</i>, 2</p>	<p>Salk. 137. (<i>n</i>) 1 Vict. c. 26. (<i>o</i>) Sect. 3. (<i>p</i>) Sect. 6.</p>
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The act does not extend to any will made before the 1st of January, 1838; nor to any estate pur autre vic of any person who died before that day (*q*).

Two attesting witnesses are substituted (*r*) for the three required by the statute of frauds.

If the lease be granted to a man, his heirs, executors, administrators, and assigns, the heir, in default of a devise, will take as special occupant, in preference to the executor or administrator (*s*).

Where lands were devised to Hannah Timmis, her heirs and assigns, to hold to the said Hannah Timmis and her assigns during the life of George Timmis; and a question arose, who was entitled to take as special occupant on the decease of the lessee, her heir or executor; the court held, that, as the habendum could not be rejected altogether, as the effect of that would be to give an estate in fee to Hannah Timmis, whereas the estate intended to be given to her was for the life of George Timmis; no doubt could be entertained that the words "during the life of George Timmis" must be allowed to limit the duration of the estate, and to explain and qualify the meaning of the word *heirs* in the premises, so as to make the person designated by that word take as special occupant (*t*).

In the case of an agreement for a lease for lives, the privilege of naming them belongs to the lessee (*u*); but he cannot name lives not in existence at the making of the agreement (*x*).

Demises of corporeal hereditaments for a freehold interest, if made by a common law lease, must be perfected by livery of seisin (*y*); and, as livery must operate instantanter (*z*), it

(*q*) Sect. 34.

(*r*) Sect. 9.

(*s*) *Atkinson v. Baker*, 4 Term Rep. 229.

(*t*) *Doe dem. Timmis v. Steele*, 4 Q. B. 663; S. C. 3 Ga. & Dav. 622.

(*u*) *Twynford v. Buckley*, 3 Keb. 203.

(*x*) *Wheeler v. D'Esterre*, 2 Dow P. C. 359.

(*y*) *Barwick's case*, 5 Co. 93, b. The reader is referred to Part the Fifth, Chap. I., for the law relating to the Instrument of demise, and the effect of the late acts of 7 & 8 Vict. c. 76, and 8 & 9 Vict. c. 106.

(*z*) *Barwick's case*, sup. *Butler v. Fincher*, 2 Bulstr. 302; S. C. 1 Rol. 229. *Greenwood v. Tyber*, or *Tyler*,

follows that such a freehold lease cannot be made to commence *in futuro* (a). If it purport to commence at a future day, it is a nullity till seisin be delivered; and the freehold in the interval remains in the lessor (b). The same restriction, however, does not apply to limitations under the statute of uses (c), by which a freehold interest may take effect though granted to commence at a future day, the immediate freehold resulting in the meantime to the grantor (d); and hence we find that livery is not necessary to the validity of a lease for life made in pursuance of a power, unless expressly required, though if made it will not prejudice the lease (e).

Seisin may be delivered either by the lessor himself, or by his attorney. If delivered by the former, a freehold lease may be good, though purporting, with reference to its date, to commence *in futuro*, provided the solemnity of livery be deferred until after the day appointed for the commencement of the term (f). When delivered by the latter, a distinction was recognised in the early cases between a general and a special power of attorney; and it was held (g), that, under a general power given by the lease to deliver seisin, the attorney could not give validity to a lease professing to grant a freehold *in futuro*, by postponing livery till the arrival of the day of commencement. At the same time, it was well understood that such a lease might be supported by livery made after the

Cro. Jac. 563; S. C. Hob. 314; S. C. nom. *Tyler v. Fisher and Greenwood*, Palm. 29; cited, Cro. Car. 95. *Tiler's case*, 2 Rol. 366, misprinted 368, scilicet. S. C. *Hatter v. Ash*, 1 Ld. Raym. 34; S. C. 3 Lev. 433. Co. Lit. 217, a.

(a) Ibid.

(b) *Freeman dem. Vernon v. West*, 2 Wils. 165-7. *Barwick's case*, sup. *Walker v. The Dean and Chapter of Norwich*, Ow. 136.

(c) 27 Hen. 3. c. 10.

(d) 1 Sand. on Uses, 142, 5th ed. by Sand. & Warn.

(e) *The Earl of Leicester's case*, 1 Vent. 273. 281, paged 291 by mistake. *Bayley v. Warburton*, Com. 494-7.

(f) *Butler v. Fincher*, sup. *Green-*

wood v. Tyber, or Tyler, sup. Anon. 2 Rol. 109. *Tiler's case*, sup. And see *Banks v. Brown*, Mo. 759. *Freeman dem. Vernon v. West*, 2 Wils. 165-7.

(g) *Greenwood v. Tyber, or Tyler*, sup. Cro. Eliz. 585. Anon. 2 Rol. 109. *Tiler's case*, sup. *Owen v. App Rees*, Cro. Car. 94; S. C., nom. *Owen v. Price*, Hetl. 22. *Hennings v. Pancharden*, Cro. Jac. 153. *Mellows v. May*, Cro. Eliz. 873; S. C. Mo. 636; the former of which reports states, that by all the court the lease was held void, and that livery made so long time after would not help it. *Moore*, on the contrary, states that the lease was held good, because livery was executed after the day of the date.

day of commencement, provided the attorney were authorised by a special power to defer livery till that time (*h*).

But this distinction was shaken by the case of *Freeman v. West* (*i*). There, the Dean and Chapter of Worcester, on the 26th of November, 1750, demised certain premises to the plaintiff's lessor; to hold to him and his heirs from the day of the date thereof for three lives; and in the lease power was given by the Dean and Chapter to their attorney to take possession of the premises, and to deliver seisin thereof to the plaintiff's lessor, according to the tenor, effect, and true meaning of the said lease; in pursuance of which power, seisin was delivered on the 28th of May, 1751, about six months afterwards; and the court determined, that the lease was good, saying that there was no difference between livery by the lessor himself, or by his attorney, according to the tenor, effect, and true meaning of the lease, six months after the date; that, by the warrant of attorney to deliver seisin in the case before them, the intention of the parties was, that the deed should be substantiated by the livery, and that in the meantime the freehold was in the grantor. The reporter adds:—"N.B. The court said they would presume that the power given to the attorney was to make livery at any day subsequent to the lease, which they said was the true meaning of the deed."

If any doubt could remain after this, it has since been dispelled by the case of *Roe v. Rashleigh* (*k*), where it was determined that a general power to make livery according to the form and effect of the lease authorised the attorney to deliver seisin at any convenient day subsequent to its date.

It was early decided, that if a lease were not executed by the lessor himself until after the day appointed for its com-

(*h*) *Greenwood v. Tyber*, or *Tyler*, sup. *Tiler's case*, sup. *Owen v. App Rees*, or *Price*, sup. And see *Walter*, or *Waller, v. The Dean and Chapter of Norwich*, Mo. 875; S. C. Ow. 136.

(*i*) *Freeman dem. Vernon v. West*,

2 Wils. 165; decided before the case of *Pugh v. The Duke of Leeds*, Cowp. 714; and see ante, p. 450; and post, as to the *Habendum*.

(*k*) *Roe dem. Heale v. Rashleigh*, 3 Barn. & Ald. 156.

mencement, livery made by attorney after the execution would be good, although the power were general (*l*).

Instant livery on a lease for life made to commence *in futuro* would formerly amount to a disseisin (*m*); but a feoffment made after the 1st of October, 1845, is deprived of its tortious operation by the late act to amend the law of real property (*n*).

If a man make, according to the common law (*o*), a lease for years, with remainder in fee, livery must be made to the tenant for years (*p*); but if tenant for years enter before livery, the term will be good, but the remainder void (*q*). If a lessor appoint the lease to commence at a future day, the remainder over in fee, there, although livery be made to the lessee, yet both livery and remainder are void, there being no present estate to which the livery can be annexed, or on which it can rest in the meantime (*r*).

After a consistent possession for a long time, as twenty (*s*), or five-and-twenty years (*t*), livery will be presumed.

A lease for life made by feoffment, with a clause that it shall be void on non-payment of rent, cannot be determined without entry; for as it could not commence by words, without livery, so a similar solemnity is necessary to determine it (*u*). With a lease for years the case is different (*x*), as it is with a lease for life created by way of limitation of use, the seisin to serve the use being granted to a third party, and not to the lessee himself.

To remedy the inconveniences occasioned by want of proof of the decease of persons upon whose lives estates might depend,

(*l*) Hennings v. Paucharden, sup.
Butler v. Fincher, sup.

(*m*) Bull v. Wyatt, Cro. Car. 388.
Anon. 2 Rol. 109. And see Tiler's
case, 2 Rol. 366. Hatter v. Ash, 1
Ld. Rayn. 34; S. C. 3 Lev. 438.

(*n*) 8 & 9 Viet. c. 106. s. 4.

(*o*) See post, Part the Fifth, Chap. I.,
as to the effect of the late acts of 7 & 8
Viet. c. 76, and 8 & 9 Viet. c. 106, on
the Instrument of Demise.

(*p*) Lit. s. 60. Co. Lit. 49, a. b. Vin.
Ab. Feoffment, L. pl. 38.

(*q*) Ibid. Plowd. 156.

(*r*) Co. Lit. 217, a.

(*s*) Rces dem. Chamberlain v. Lloyd,
Wightw. 123.

(*t*) Biden v. Loveday, cited, 1 Vern.
196.

(*u*) Plowd. 135-6.

(*x*) Ibid.

on their going beyond the seas or absenting themselves, a statute was passed in the reign of Charles the Second (*y*), which, after noticing that estates had been granted by lease for one or more life or lives, or for years determinable upon one or more life or lives, and that the persons for whose lives such estates had been granted, had often gone beyond the seas, or so absented themselves for many years, that the lessors and reversioners could not find out whether such persons were alive or dead, provided (*z*), that if the persons for whose lives such estates might be granted should remain beyond the seas, or elsewhere absent themselves in this realm, for seven years together, and no sufficient proof should be made of their lives in any action commenced for recovery of such tenements by the lessors or reversioners; such persons should be accounted as naturally dead.

But (*a*) that if any eviction should take place in consequence, and afterwards such person should return from beyond seas, or should on proof in any action to recover the lands be made appear to be living, or to have been living at the time of the eviction; then the party evicted, his executors, administrators, or assigns, might re-enter and re-possess the lands for his former estate, and recover for damages the full profits of the lands with lawful interest from the time of eviction, as well when the persons upon whose lives such estates might depend should be dead at the time of bringing of the action, as if they were then living.

Though lessors and reversioners only were mentioned in the act, Holt, C.J., was of opinion that a remainder-man was within the equity of it (*b*).

And though, by virtue of its provisions, a party who has been absent seven years without having been heard of, is presumed to be dead, there is no legal presumption as to the time of his death (*c*). The fact of his having been alive or

(*y*) 19 Car. 2. c. 6.

(*z*) Sect. 2.

(*a*) Sect. 5.

(*b*) Holman v. Exton, Carth. 246.

(*c*) Nepean v. Doe dem. Knight, 2

Mees, & Wel. 894; and Mur. & Hurl. 291, in Exch. Chamb. in Error; S. C. in K. B., 5 Barn. & Adol. 86; S. C., nom. Doe dem. Slade v. Nepean, 2 Nev. & Man. 219. 6 East, 85.

dead at any particular period during the seven years must be proved by the party relying on it (*d*).

Both at law and in equity, where it is necessary to produce proof of the cestui que vic being alive, the party will be entitled to obtain it by the means open to every other defendant, and of course by a commission for the examination of witnesses (*e*). And in the case cited, the court ordered that the plaintiffs should be at liberty to sue out a commission for the examination of witnesses in New South Wales, to prove whether one of the cestuis que vic named in the lease was living or dead, and if dead, when he died; that the defendants should, in six days after notice, join and strike commissioners' names with the plaintiffs' clerk in court; and that, in default thereof, the plaintiffs should be at liberty to take out such commission directed to their own commissioners.

Evidence by a person residing near the property in dispute, that the tenant for life had not been seen in the neighbourhood for fourteen years, is sufficient to found a presumption of his death, although no member of his family be called to prove it. If any of them have heard of him in the interval, they may be called to rebut the presumption (*f*).

In a late case (*g*), a lease *pur autre vie* contained a covenant by the lessee that he would, within three months after notice, produce to the lessor the cestui que vic, [named Charles Randle,] or otherwise make it appear to him, within that time, or within a reasonable time, if the cestui que vic should happen to be in foreign parts, by a good and sufficient certificate, that he was living; and there was a proviso for re-entry on non-performance of all the covenants contained in the lease. It appeared that the requisite notice was given by the lessor in December, 1833, and that in March, 1834, the lessee gave notice to the lessor that the cestui que vic was living, and was,

(*d*) Ibid. *Holman v. Exton*, Prec. Ch. 246. And see *Watson v. England*, 14 Sim. 28.

(*e*) *Brown v. Petre*, 2 Swanst. 235.

(*f*) Doe dem. *Lloyd v. Deakin*, 4 Barn. & Ald. 433.

(*g*) *Randle v. Lory*, 6 Adol. & Ell. 218.

and had been for upwards of three months, in foreign parts. In the latter end of the year, the lessee produced an affidavit, sworn on the 4th of October before a justice of the peace for the county of Cornwall, that, in the year 1829, the deponent resided in Gongo Locko in the Brazils, and was employed as a captain in conducting a mine under Colonel Skerrett, of the Brazilian Mining Association; that one Charles Randle was employed under the said company, in the year aforesaid, as a clerk or cashier, and that he continued in such situation, and held the same, until some time in the year 1831, when he left the company, and went to reside about thirty miles distant in the country, where he remained to the best of the deponent's knowledge, information, and belief, until the month of January then last past, when the deponent left the country; and that from the time when Charles Randle quitted the employ of Colonel Skerrett in 1831, to the time the deponent left South America in January 1834, he frequently heard of the said Charles Randle, and a few days before the deponent left, he heard that the said Charles Randle was then in the country. And the deponent further said, that he was convinced that the said Charles Randle was alive and well at the time the deponent left America in the month of January, 1834. The court held the affidavit to be insufficient, as the witness did not himself assert the fact of the *cestui que vie* being alive, but merely stated circumstances from which one jury might infer it, but another might not. As to the case, said Lord Denman, C. J., which was put by counsel, of the receipt of letters; where anything is properly to be inferred from a party having been alive at a particular time, a letter then written by him is no doubt direct proof that he was alive at that time, and supports the inference; but that is a very different case from the present. According to the argument for the plaintiff, a certificate of Charles Randle having been alive at any time within seven years would have satisfied this covenant, because he could not have been presumed dead till the end of the seven years.

Greater facilities being required for the proof of the existence of persons on whose lives estates might depend, another act was passed in the reign of Queen Anne (*h*), which, after noticing that divers persons as guardians, and trustees for infants, and husbands in right of their wives, and other persons having estates determinable upon a life or lives, had continued to receive the profits of such lands after the determination of the particular estates, and that the proof of the death of the persons on whose lives such particular estates depended was very difficult, enacted, that any person who shall have any claim to any remainder, reversion, or expectancy, in any estate after the death of any person within age, married woman, or any other person whatsoever, upon affidavit made in the court of Chancery by the persons so claiming such estate of his title, and that he hath cause to believe that such minor, married woman, or other person, is dead, and that his death is concealed by such guardian, &c., may once a year, if the person shall think fit, move the court, to order such guardian, &c., at such time and place as the court shall direct, on personal or other due service of such order, to produce to such person and persons (not exceeding two) as shall in such order be named by the party prosecuting such order, such minor, &c., and that if such guardian, &c. shall neglect to produce such infant, &c. accordingly, then the court is required to order such guardian, &c. to produce such minor, &c. in the court of Chancery, or otherwise before commissioners to be appointed by the court, at such time and place as the court shall direct, two of which commissioners, it was declared, shall be nominated by the party prosecuting such order at his costs; and that in case such guardian, &c. shall neglect to produce such infant, &c. in court, or before such commissioners whereof return shall be made by such commissioners, and that return filed in the Petty Bag office, the minor, &c. shall be taken to be dead, and it shall be lawful for any person claiming any interest in

(*h*) 6 Anne, c. 18.

remainder, or reversion, or otherwise, after the death of such infant, &c., to enter upon such lands as if such infant, &c. were actually dead.

But (*i*) that if it shall appear to the court by affidavit, that such minor, &c. is or lately was at some certain place beyond the seas in the affidavit to be mentioned, it shall be lawful for the party prosecuting such order, at his costs, to send over one or both the said persons appointed by the order to view such minor, &c.; and that in case such guardian, &c. shall neglect to produce to such person or persons a personal view of such infant, &c., then such person or persons are required to make a true return of such neglect to the court, which return it is declared shall be filed in the Petty Bag office, and thereupon such minor, &c. shall be taken to be dead; and that it shall be lawful for any person claiming any interest in remainder, reversion, or otherwise, after the death of such infant, &c., to enter upon such land as if such infant, &c. were actually dead.

That if (*k*) it shall afterwards appear upon proof in any action, that such infant, &c. was alive at the time of such order made, then it shall be lawful for such infant, &c., his executors, administrators, or assigns, to maintain an action against those who since the order received the profits of such lands, or their executors or administrators, and to recover full damages for the profits of the same received from the time that such infant, &c. was ousted of the possession of such lands.

That (*l*) if any such guardian, &c. shall by any affidavit, or otherwise, to the satisfaction of the court, make appear that he has used his utmost endeavours to procure such infant, &c. to appear in court or elsewhere, according to the order, and that he cannot procure such infant, &c. to appear, and that such infant, &c. is or was living at the time of such return made and filed as aforesaid, then it shall

be lawful for such person to continue in the possession of such estate, and receive the profits thereof during the infancy of such infant, and the life or lives of such married woman, or other person or persons on whose life or lives such estate or interest doth or shall depend, as fully as he, she, or they might have done if the act had not been made.

It was further enacted (*m*), that every person who, as guardian, &c., after the determination of such particular estates, without the express consent of the party next and immediately entitled upon and after the determination of such particular estates, shall hold over, shall be adjudged a trespasser; and that the person, his executors and administrators, who may be entitled to the lands upon or after the determination of such particular estates, may recover in damages against the person holding over, his executors or administrators, the full value of the profits received during such wrongful possession.

Under this act, the application need not be made by the person entitled immediately after the death of the party. Thus, where the estate was limited to one Mary Woodroffe for ninety-nine years if she should so long live, with remainder to trustees to preserve &c.; remainder to the heirs of the body of Mary; remainder to the same trustees, upon trust to sell, and divide the produce among certain persons; a motion by the trustees and cestui que trust that the husband of Mary should produce her, founded on affidavits that she had left him nine years before, and that while she was known to be living she never had any child, and to the best of the belief of the deponents, was not then pregnant, was acceded to by the Chancellor, who made the order accordingly (*n*).

In the case of *St. Aubyn* (*o*), where a landlord made an application that his tenant under a lease for three lives might produce the person alleged by the tenant to be the surviving

(*m*) Sect. 5.

(*n*) *Ex parte Grant*, 6 Ves. 512.

(*o*) *Ex parte St. Aubyn*, 2 Cox, 373.
Re Lingin, 12 Sim. 104.

cestui que vie, the motion being supported by an affidavit stating the deponent's belief that the cestui que vie was dead; the Lord Chancellor made an order, that the tenant should produce the cestui que vie before A. B. and C. D., at the porch of the parish church of Stoke Damarel, (where the estate lay,) on Saturday the 15th of June, a fortnight after making the order, between the hours of ten and twelve in the forenoon; which was said to be the usual manner of making orders under the act of parliament. And a similar order was more recently made by Lord Lyndhurst, C. (*p*).

And in a later case (*q*) a similar order was obtained, and served upon the lessee, who, however, neglected to produce the cestui que vie, as appeared by affidavit, and by the return made by the two persons to whom the cestui que vie was ordered to be produced; whereupon another order was obtained, commanding him to produce the cestui que vie at the bar of the court, at the sitting of the court, at ten o'clock in the morning of the 1st of May, 1841. The lessee having disobeyed this as well as the former order, the registrar doubted whether the act did not require that some return to the last order should be made into the Petty Bag office, before an order entitling the reversioner to enter on the demised premises could be drawn up; but the Vice-Chancellor only considered it necessary that the registrar should insert a minute in the book of the proceedings of the court, that, at the sitting of the court at ten o'clock in the morning, no person represented to be the cestui que vie was produced or appeared.

The court has no power to order a remainder-man expectant upon the determination of an estate pur autre vie to pay to the tenant pur autre vie the expenses of producing the cestui que vie under the act of Queen Anne (*r*).

Notwithstanding the fifth section of the statute of Anne, Lord Chancellor Parker held, that a party continuing to hold under an expired lease pur autre vie was not liable either at

(*p*) Ex parte Whalley, 4 Russ. 561.

(*q*) Re Lingen, 12 Sim. 104.

(*r*) In the matter of Isaac, 4 My l. & Cr. 11.

law or in equity to account for mesne profits, it being the lessor's own negligence not to enter. But he determined that, in a case of fraud, or where an infant might be concerned, or the lessor mistaken as to his right of entry in consequence of the lessee's having two daughters of the same name by different wives, and one of these daughters being cestui que vie, and dying, the other being still alive, the person in possession would be decreed to account for the mesne profits from the time of the expiration of the lease (*s*).

(*s*) *Duke of Bolton v. Deane*, Prec. Ch. 516.

CHAPTER VII.

AS TO RENEWABLE LEASES.

SECTION I.—OF THE NATURE OF “TENANT RIGHT” OF
RENEWAL.

RENEWABLE leases are not of such common occurrence in this country as in Ireland, where great part, one-seventh it is said (*a*), of the lands are held under leases for lives with covenants for perpetual renewal on payment of certain fines (*b*). In the West of England (*c*), however, and in some districts of the North also (*d*), leases are usually granted with covenants for renewal.

It has long been customary for the crown, ecclesiastical corporations, and collegiate bodies (*e*), and it is often usual with private individuals, on the determination of a lease, or the surrender of the existing portion of it, to grant a new term to the lessee in possession; from which practice an erroneous notion has sprung (*f*), that such lessee has a prescriptive right to continue in the tenancy in preference to

(*a*) Lloyd & Goo. 401, temp. Plunk.

(*b*) Irish Tenantry Act, 19 & 20 Geo. 3. c. 30, Preamble. Boyle *v.* Lysaght, 1 Ridgew. P. C. 384. 402; S. C. 1 Vern. & Scriv. 135. Sir Samuel Romilly, in Iggulden *v.* May, 9 Ves. 331, said that the greatest part was so held. In a note to O’Neil *v.* Jones, 1 Ridgew. P. C. 179, the 7th part is said to have been so held; and see 1 Scho. & Lef. 447.

(*c*) Daniels *v.* Davison, 16 Ves. 254. Pickering *v.* Vowles, 1 Bro. C. C. 198. Brown *v.* Tighe, 8 Bli. P. C. N. S. 272.

S. C. 2 Cl. & Fin. 396.

(*d*) 14 Ves. 332. Brown *v.* Tighe, sup. Doe dem. Bromley *v.* Bettison, 12 East, 305.

(*e*) As to leases, generally, by corporations ecclesiastical, eleemosynary, and municipal, and the restraints imposed on their powers of granting renewals, see p. 238. 251; and p. 312, *et seq.*

(*f*) Watson *v.* The Master &c. of Hemsworth Hospital, 14 Ves. 339. And see 1 Bro. C. C. 198. 12 Ves. 36.

any other person (*g*). Serious hardship would, indeed, be occasioned, if a landlord, by repeated renewals to the same individual, his descendants, or representatives, granted, perhaps, in consideration of family connexion, punctuality in payment of rent, or superior agricultural qualifications, were to create an ownership against himself, and in favor of others who might be destitute of any of these claims upon his indulgence. Accordingly, we find that, independently of local custom (*h*), the demand is not enforceable at law, nor have applications to equity for the purpose been attended with greater success (*i*). The technical expression, *tenant right of renewal*, is therefore extremely inaccurate (*j*). This right (as it is termed) confers no positive interest, either vested or contingent: it is a naked possibility, depending solely on the caprice of the lessor; and Lord Eldon said (*k*) that he had known family settlements that had gone on for 150 years put an end to by the lessor's refusal to renew; though in a later case (*l*) a presumption was held to have arisen, under peculiar circumstances, on an uninterrupted possession of nearly 150 years. In the case alluded to, successive leases for twenty-one years of the tithes of corn, grain, and hay, in the parish of S., at a rent and fine certain, had been granted by the improper rectors for the time being, to the vicars for the time being of S., from the year 1682 to the year 1805, when the last lease for the same term of twenty-

(*g*) According to Anon. 2 Ch. Ca. 207-8; A. D. 1675, by the French law, no churchman could make a lease to any but the old tenant, unless it were first refused by him.

(*h*) See Watson v. The Master &c. of Hemsworth Hospital, 14 Ves. 324. 332. 339.

(*i*) Lee v. Vernon, 7 Bro. P. C. 432; Toml. Ed. Vol. 5, p. 10. And see Darrell v. Whitehot, 2 Rep. in Ch. 59. 60. Ed. 1715, where it is said, that there is no tenant right against the King; and Norris v. Le Neve, 3 Atk. 27. 38.

(*j*) Pickering v. Vowles, 1 Bro. C.

C. 198.

(*k*) White v. White, 9 Ves. 557. And see the evidence of Vincent Stuckey, Esq. before the Select Committee on Church leases, 7th of June, 1838, p. 33. No. 443; and Bell dem. Smyth v. Nangle, 1 Jebb & Sy. 199; S. C., nom. Smyth v. Nangle, 7 Cl. & Fin. 405; 1 West's Appeal Cases, 184; S. C. Bell dem. Smyth v. Nangle, 2 Jebb & Sy. 629. Nangle v. Smith, 1 Irish Eq. Rep. 119.

(*l*) The Attorney-General v. The Bishop of Ely, 4 Russ. 102.

one years was made ; and the court presumed that what had been enjoyed so long by one party, and conceded by the other, was founded on a rightful title, and could not have depended on the mere caprice or pleasure of the rector for the time being ; and that, as the lease had been originally granted by way of augmentation of the vicarage under the letter of Charles the 2nd (*m*), and as such augmentation was confirmed and made perpetual by the act of 29 Car. 2. c. 8. s. 2, the vicar was entitled to a renewal of the lease.

So valuable, however, is the prospect of renewal considered, being available, as it is, for most purposes of sale, mortgage, devise, and family settlement, that it enhances the price of the lease on a sale, the purchaser speculating on the improbability of his being removed so long as he pays the fines and rent demanded, and otherwise performs the duties of a tenant (*n*). And lately, on the petition of trustees of a renewable leasehold held under the Bishop of Winchester, this tenant-right or interest was so far recognised by the court of Chancery, that an order was made that they should be at liberty to take steps for obtaining a clause for compensation for it inserted in an act pending in parliament for making a new street, which would require part of their property (*o*).

Strictly speaking, a *right* of renewal must be the result of express compact ; and to secure it is the object of the covenant for renewal occasionally contained in leases. This will be examined in the next section.

(*m*) This letter (dated, 1 June, 12 Car. 2.) to the bishops contained the following clause :—"That no lease be granted of any rectories or parsonages belonging to your see, belonging to you or your successors, until you shall provide that the respective vicarages or curates' places where are no vicarages endowed, have so much revenue in glebe, tithes, or other emoluments, as commonly will amount to 100*l.* or 80*l.* per annum, or more if it will bear it ; and in good form of law settle it upon

them and their successors. And where the rectories are of small value, and cannot admit of such proportions to the vicar and curate, our will is, that one half of the profit of such a rectory be reserved for the maintenance of the vicar or curate, as is agreeable to the rates and proportions formerly mentioned." Gibs. Codex, 756 ; & 2 ed. p. 721.

(*n*) *Lee v. Vernon*, sup.

(*o*) *Jones v. Powell*, 4 Beav. 96.

SECTION II.—OF THE EXPRESS CONTRACT FOR RENEWAL.

1.—*As to the renewal being optional or compulsory.*

Sometimes the contract gives an option to the lessee exclusively to renew (*p*); but more frequently it is mutual, the lessor engaging to grant, and the lessee to take, the renewal. In one case (*q*), where a party holding certain premises as lessee under the Archbishop of Dublin, agreed to underlet them for a longer term than he was then possessed of, and, to carry the agreement into effect, covenanted that he would endeavour to procure such renewals as would enable him to renew, so as to complete the full term agreed on, the sub-lessee paying a proportion of the renewal fine, an agreement was implied, that the sub-lessee would take such renewal, though the lease contained no express covenant by him for that purpose.

And the late case of *Curry v. Stanley* (*r*) is an authority for the same position.

On the other hand, where a lease was granted for three lives or the longest liver of them, “or whatever life or lives shall for ever or hereafter be nominated or appointed, added or inserted at the back of this indenture, or label affixed thereto, paying for each and every life so renewed a peppercorn if demanded”; with a reddendum of a certain price per acre; and the ordinary lessee’s covenants; but the deed did not contain an express covenant for perpetual renewal; the Master of the Rolls in Ireland refused to decree a specific performance of a contract for sale representing the property to be held under a lease for lives renewable for ever; but on

(*p*) *Rubery v. Jervoise*, 1 Term Rep. 229, 235. *Bayley v. The Corporation of Leominster*, 1 Ves. jun. 476; S. C. 3 Bro. C. C. 529. *City of London v. Mitford*, 14 Ves. 41. *Maxwell v. Ward*, 11 Pri. 3; S. C. 13 Pri. 674.

Bell v. Nangle, 1 Jebb & Sy. 199. 203.

(*q*) *Lord Frankfort v. Thorpe*, 2 Ball & Beat. 372.

(*r*) *Curry v. Stanley*, 1 Hay. & Jo. 487.

appeal, Sir E. Sugden, C., apparently considering that the habendum amounted to a covenant for perpetual renewal, offered the parties a case for the opinion of a court of law; but the suit was finally compromised (s).

If the covenant, obviously by mistake, make the renewal compulsory on the lessee, instead of giving him the option, a court of equity will rectify the error (t).

II.—As to the quantity of interest contracted for.

The question, What quantity of interest is contracted for, can only be solved by the construction given to the agreement for renewal. And we may here observe that, with reference to its construction, it is immaterial whether it be contained in an instrument under seal, or not under seal; and equally so, whether the construction be arrived at through the medium of a court of law, in an action for damages for neglect of performance; or of a court of equity, on a bill for a specific performance (u). The true construction of the instrument must be the same in every court; though it is a common practice for equity, when the construction is doubtful, to send a case for the opinion of a court of law; or to retain a bill for a time, for the purpose of enabling a plaintiff, by an action at law, to obtain the legal construction of the contract (x).

The courts in England (for I shall not particularly examine the practice of the Irish Judicature, which proceeds on a local equity (y), and the Irish tenantry act (z),) are strongly

9 App. Cas. 844

(s) Sheppard v. Doolan, 1 Flan. & Kel. 598; S. C. 5 Irish Eq. Rep. 6; S. C. on appeal, 3 Dru. & War. 1.

(t) Ashton v. Bretland, 9 Mod. 53; S. C. 2 Eq. Ca. Ab. 57.

(u) Eaton v. Lyon, 3 Ves. 692. Ig-gulden v. May, 9 Ves. 329; 7 East, 246; 3 Smith, 269. Maxwell v. Ward, 13 Pri. 677. 681. Brown v. Tighe, 8 Bli. P. C. N. S. 417.

(x) Reece, or Rees, v. Lord Dacre, 3 Hargr. Jurisc. Exerc. 206. 237; S. C. 1 Hargr. Jurid. Arg. 438; 9 Ves. 332.

Iggulden v. May, sup. Dowling v. Mill, 1 Madd. 541. 548. Maxwell v. Ward, sup.; S. C. 11 Pri. 3; 1 McClel. 458.

(y) For information on this point, the reader may refer to the cases of Boyle v. Lysaght, 1 Ridgew. P. C. 384, and Magrane v. Archbold, 1 Dow, P. C. 107. 109, which explain the principles on which perpetual renewals have been decreed in Ireland; and to the cases mentioned in note (k), post, p. 761.

(z) 19 & 20 Geo. 3. c. 30.

opposed to perpetual renewals (*a*) ; and Lord Thurlow almost brought himself to a belief, though he never proceeded so far in judgment, that any man who entered into such a covenant must be supposed so little to understand the nature of a bargain and of property, that the court ought not to execute it by a specific performance (*b*). But notwithstanding that learned Judge's denunciation of this species of contract, it is now indisputably settled that an action may be maintained on it at law, and that equity will carry it into specific execution in cases containing evidence of a perpetual renewal having been intended by the parties (*c*) ; and instances have been suggested in which its introduction, so far from being unreasonable, might be equally beneficial to both lessor and lessee ; as in the case of a party taking a lease of unproductive sea-beach upon a building speculation, with an option to relinquish it at the expiration of the term first granted, or retain it for ever under perpetual renewals (*d*).

Strong proof of intention, however, is requisite to support such a contract ; and, in the absence of an intention to that effect, expressed or clearly implied, equity will not decree a specific performance, although the parties themselves might possibly have contemplated a perpetual renewal (*e*).

Nor will a specific performance of a covenant for perpetual renewal be decreed, if it be improvident, absurd, and unequal, as if the lessor grant a lease of premises worth 120*l.* a year, at a yearly rent of 3*l.*, and a covenant for renewal for ever on

(*a*) *Furnival v. Crew*, 3 Atk. 87 ; S. C. 9 Mod. 446. *Taylor v. Stibbert*, 2 Ves. jun. 443. *Baynham v. Guy's Hospital*, 3 Ves. 298. Per Willes, J., in *Cooke v. Booth*, Cowp. 323. *Moore v. Foley*, 6 Ves. 237. *Maxwell v. Ward*, 11 Pri. 13 ; S. C. 13 Pri. 674 ; *McClell*. 458.

(*b*) *Tritton v. Foote*, 2 Cox, 174. *Iggulden v. May*, 9 Ves. 330. *Attorney-General v. Brooke*, 18 Ves. 326. *Brown v. Tighe*, 8 Bli. P. C. N. S. 272. 287 ; S. C. 2 Cl. & Fin. 396.

(*c*) *Moore v. Foley*, 6 Ves. 236.

Baynham v. Guy's Hospital, 3 Ves. 298. *Iggulden v. May*, 9 Ves. 334. *Maxwell v. Ward*, sup. *Willan v. Willan*, 16 Ves. 84 ; S. C. 2 Dow, P. C. 275. *Dowling v. Mill*, 1 Madd. 546-9. *Brown v. Tighe*, sup. And see *The City of London v. Mitford*, 14 Ves. 41, a case of express covenant for perpetual renewal.

(*d*) *Iggulden v. May*, 9 Ves. 331 ; 7 East, 243.

(*e*) *Moore v. Foley*, 6 Ves. 237. *Harnett v. Yeilding*, 2 Scho. & Lef. 549.

payment of a fine of 3*l.* every ten years, without any other consideration (*f*).

So, where one being administratrix of her husband, for the benefit of their children, made an underlease of certain lands which she held under a church lease, to the appellant, at a yearly rent, taking at the same time a fine of 70*l.*, and covenanted that, as long as she held the head lease in question, and as often as she obtained a renewal from the archbishop, she, her executors, &c., would renew the sublease, under a penalty of 70*l.*, it was held that the contract was so improvident that a renewal could not be enforced, particularly as the covenantor was administratrix; and that the option to pay the 70*l.* was meant as an alternative, and the only means of making it reasonable. And it was declared by Lord Eldon and Lord Redesdale, that even if Mrs. Archbold had been absolute owner the contract would have been bad (*g*).

And the same rule prevails where the covenant has been inserted by mistake (*h*).

So again, if the lessors be trustees, and a lease perpetually renewable would be in violation of, or inconsistent with, the nature of their trust, the court will not compel the execution of a covenant for the purpose (*i*). And the same course is adopted where the term covenanted to be granted, though not perpetually renewable, would exceed the term prescribed by the founder of a charity. Thus, where the founder of the Hospital of Felstead, in Essex, directed that no lease should be made for any longer term than twenty-one years, and the trustees demised the premises for that term, with a covenant to renew until the twenty-one years should be made up sixty years, the lessee's bill for specific execution was dismissed, the court considering the performance of such a covenant as

(*f*) *Redshaw v. The Governor and Company of the Bedford Level*, 1 Eden, 346. And see *Attorney-General v. Brooke*, 13 Ves. 326.

(*g*) *Magrane v. Archbold*, 1 Dow, P. C. 107. But see *Hackett v. McNamara, Lloyd & Goo.* 233, temp. Plunk. C.

(*h*) *Redshaw v. The Governor and Company of the Bedford Level*, 1 Eden, 346. *Ashton v. Bretland*, 9 Mod. 58; S. C. 2 Eq. Ca. Ab. 57.

(*i*) *Attorney-General v. Brooke*, 13 Ves. 319.

much in violation of the founder's intention, and as prejudicial to the charity, as an original grant for sixty years (*j*).

The peculiar circumstances of the case of the Attorney-General *v. Smith* (*k*), which Sir William Grant (*l*) said was the only one of the kind he had met with, were held to warrant a decree for perpetual renewal, the lessee having, by great activity and at considerable expense, recovered for the charity an estate which had got into the hands of patentees as concealed land. Certain it is that, unless the lease be founded on ample consideration, and obviously for the benefit of the charity, a perpetual renewal will not be enforced (*m*). The burthen of proving the sufficiency of the consideration is cast on the lessee (*n*).

And here we may observe, that if premises be granted to trustees upon trust to let, set, and manage the same to the best advantage, and to apply the yearly rents among the creditors of the grantors, a specific performance of an agreement for a lease with a covenant for renewal will not be refused on the ground of its being a breach of, or inconsistent with, the nature of such trust; for trusts of this kind are temporary and generally short. Creditors hardly ever expect that such a trust will endure for more than twenty-one years. It is their interest to get the highest rent for twenty-one years; and, at the granting of the lease, they look to the circumstance of present advantage, and are not to be supposed to look to a subsequent period. If they were told that they might let the estate at a lower rent without the covenant for renewal, they would no doubt reject it,

(*j*) *Lydiatt v. Foach*, 2 Vern. 410. *Taylor v. Dulwich Hospital*, 1 P. Wms. 655; S. C. 2 Eq. Ca. Ab. 193. pl. 2. *Watson v. Hensworth Hospital*, 2 Vern. 596; S. C. 1 Eq. Ca. Ab. pl. 3. *Watson v. The Master &c. of Hensworth Hospital*, 14 Ves. 324. 333. *Somerville v. Chapman*, 1 Bro. C. C. 61.

(*k*) *Attorney-General v. Smith*, 2 Vern. 746. See also *Watson v. The*

Master &c. of Hensworth Hospital, 14 Ves. 333. *Attorney-General v. Warren*, 2 Swanst. 303.

(*l*) 14 Ves. 333.

(*m*) *Attorney-General v. Brooke*, 18 Ves. 319. 326. *Attorney-General v. Warren*, 2 Swanst. 291. 303.

(*n*) As to leases by Trustees of Charities, see ante, p. 347.

and desire to get the highest rent, looking to their present advantage (*o*).

The case of *Furnival v. Crew* (*p*) furnishes an example of a decree for specific performance of a covenant for perpetual renewal, on the principle of intention. There, the defendant's grandfather, Mr. John Crew, being seised of the premises in question in fee, on the 24th of October, 1682, in consideration of the surrender of a former lease, in which there were two lives in being, and of 136*l.*, demised them to Moor and his assigns, for the lives of Moor, his wife, and his son, and the life of the longest liver, at a yearly rent of 43*s.* 8*d.*: and Moor covenanted with Crew, that, at the death of any of the lives before mentioned, he (Moor), his executors, &c., would pay to Crew, his heirs or assigns, within twelve months next ensuing such death, the sum of 6*£l.* in the nature of a fine (*q*), for to add one other life to the remaining two lives, and so to continue the renewing of such lease or leases, paying as aforesaid to the said John Crew 6*£l.* for every life so added or renewed as aforesaid from time to time. And Crew, for himself, his heirs, &c., covenanted with Moor, his executors, &c., that he, Crew, his heirs, &c., would, for the consideration of 6*£l.* as aforesaid, to be paid to Crew, his heirs, &c., at Crew Hall, or at the place where the said hall then stood, execute one or more lease or leases under the same rents and covenants with the lease of 1682, and therein add such life or lives of such person or persons as should be then and at such time nominated to be added by the said Moor, his executors, &c., within the term of twelve months next after the death of any such life as aforesaid. The plaintiff was assignee of Moor. Lord Hardwicke was of opinion

(*o*) *Kirkham v. Chadwick*, 13 Ves. 547.

(*p*) *Furnival v. Crew*, 3 Atk. 33; S. C. 9 Mod. 446; Approved of in *Baynham v. Guy's Hospital*, 3 Ves. 295; *Moore v. Foley*, 6 Ves. 237; and *Iggulden v. May*, 7 East, 245.

(*q*) The conclusion of this covenant, and the succeeding covenant, are taken

from a note attached to the 3rd edition of Atkyns by Sanders, and as the covenant appeared in the registrar's book, and not from the covenant as it is set out in the text of Atkyns's Report. Part of Lord Hardwicke's judgment is scarcely intelligible when applied to the covenant in the text of Atkyns.

that the words "and so to continue the renewing of such lease or leases to Thomas Moor, or his assigns, paying as aforesaid," clearly meant, not barely continuing a new life, but continuing and filling up the estate from time to time; and that the *or* (in lease or leases) must be construed *and*; comprehending new leases: and that the words "for every life so added as aforesaid" signified any of the lives in the future leases. And he decreed in favor of a perpetual renewal, declaring that the plaintiff was entitled to have the like covenants inserted upon every new renewal, as well upon the death of the new lives, as upon the death of the old.

It seems to be considered that the words "from time to time," or "and so *toties quoties*," added to the covenant will have the same effect (*r*); though, in *Baynham v. Guy's Hospital*(s), the words "from time to time and at all times hereafter" were held to be controlled in this respect by the other parts of the covenant.

A covenant in the following terms:—"And further it is agreed between the said parties, that the said W. F., his heirs and assigns, is to pay the sum of 15*l.* sterling upon the death of any of the lives that shall first happen; that in consideration thereof the said M. H., his heirs and assigns, shall perfect a new lease of the premises for three lives, under the yearly reservations and covenants aforesaid, whereof two of the said lives are to be part of the said three lives; and upon the same terms upon all times hereafter upon the death of any life, the renewing of a life, or changing of a life; the said lease to be perfected at the costs and charges of the said W. F., his heirs and assigns," has likewise been held to amount to a covenant for perpetual renewal (*l*).

But an agreement in a lease for lives, "that, upon the renewing or inserting of any life or lives, there shall be paid

(*r*) *Furnival v. Crew*, sup. *Iggulden v. May*, 7 East, 242-3; 3 Smith, 269. *Maxwell v. Ward*, 11 Pri. 3; S. C. 13 Pri. 674; 1 McClell. 453. And see *Atkinson v. Pilsworth*, 1 Vern. &

Seriv. 156.

(*s*) *Baynham v. Guy's Hospital*, 3 Ves. 295.

(*l*) *Lord Clermont v. The Marquis of Downshire*, cited, *Batty*, 541, n. (b).

by the lessee, his heirs or assigns, unto the lessor, his heirs or assigns, the full sum of 16*l.* 16*s.* 4*d.* sterling," was held not to import a perpetual renewal (*u*).

The covenant frequently stipulates that the lessor shall renew "under the same rent and covenants" as those contained in the original lease; and two or three cases are to be found where it was held that these words rendered necessary the insertion of a like covenant for renewal in each succeeding lease, thus virtually converting the covenant into one for perpetual renewal. This was decided by the House of Lords, on appeal, in the case of *Bridges v. Hitchcock* (*x*). The appellant demised a mill and premises to Stapleton, through whom the respondents claimed, for twenty-one years, at a yearly rent; and covenanted that if the lessee, his executors, &c., should at any time thereafter before the expiration of the term be minded to renew and take a further lease of the premises, then, upon application made at any time before the last six months of the said term, he (the appellant), his heirs or assigns, would grant such further term as should by the lessee, his executors, &c., be desired, without any fine, "and under the same rents and covenants only" as in that lease. It appeared that the respondents had expended 1800*l.* in converting the corn-mill into a mill for manufacturing brass and iron, and in building a substantial brick mill-house in the place of the corn mill-house formerly standing. On a bill filed in the court of Exchequer, the appellant was decreed to execute a new lease to the respondent, Hitchcock, for twenty-one years, under the same rents and covenants as in the old lease, which new lease was to be settled by one of the Barons in case the parties differed. Pursuant to this decree, the new lease was settled by the Lord Chief Baron, and contained a covenant to grant a further lease at the end of the new term.

(*u*) Bell dem. *Smyth v. Nangle*, 1 Jebb. & Sy. 199; S. C. 2 Jebb & Sy. 629; S. C., on appeal, nom. *Smyth v. Nangle*, 7 Cl. & Fin. 405; 1 West's Appeal Cases, 184. *Nangle v. Smith*,

1 Irish Eq. Rep. 119.

(*x*) *Bridges v. Hitchcock*, 1 Bro. P. C. 522; Toml. Ed. Vol. 5, p. 6; Jour. Vol. 20, p. 37, decided A.D. 1715.

Against this decree Bridges appealed, insisting that the covenant for a further lease, after the expiration of the new lease, was in the nature of a perpetuity upon the appellant's estate, and might, according to the decree, be demanded from time to time continually, which was contrary to the meaning of the covenant in the first lease, and of the parties thereto. On the other side, it was contended, that the covenant entered into by the appellant to grant such further lease as should be demanded, under the same rents and covenants only as in the original lease, was the only foundation and encouragement which the parties had for expending so much money upon the premises as they had done, and, accordingly, that it was the true intent and meaning of the covenant that the lessee should be at liberty to renew as often as he should require. It was finally ordered that the appeal should be dismissed, and the decree of the Exchequer affirmed.

It is to be regretted that the absence of all remark by the court of appeal in *Bridges v. Hitchcock* renders it impossible to state the ground of the decree. Lord Hardwicke appears to have considered that it was influenced by the fact of the tenant's having expended a considerable sum on the premises. "It was mentioned," said his Lordship (y), "that 1800*l.* had been laid out by the tenant in turning the corn-mill into a wire-mill, and therefore he was entitled to a building lease. Suppose the court had decreed him another term only of twenty-one years; it might appear to be a satisfaction for the sum so expended; but the court of Exchequer were of opinion to decree him a lease with the same covenant of renewal from time to time." Lord Ellenborough, however, and afterwards the Exchequer Chamber (z), referred the decision to a different ground: His Lordship denied that it turned on the covenant to grant under the same covenants; he said that it had the additional circumstance of the covenant to grant such further lease as the lessee should desire; so that the

(y) In *Furnival v. Crew*, 3 Atk. 39.

(z) In *Iggulden v. May*, 7 East, 245; 3 Smith, 279; 2 New Rep. 452.

covenant left it to the lessee himself to say what interest he would require to be granted to him, without any restriction or limitation, except that no covenant should be introduced not contained in the original lease: nor was it unfair (added his Lordship) to infer from thence, that he who might have asked a lease for any number of years, did not exceed what was intended by requiring one with a covenant to renew. And Lord Thurlow seems to have inclined to the same opinion (*a*).

By the decision of this case, however, Lord Hardwicke was influenced in *Furnival v. Crew* (*b*), already quoted, where he decreed in favor of a perpetual renewal, having first noticed that in the case of *Bridges v. Hitchcock* the court of Exchequer, and afterwards the House of Lords, had held that, under the words the words “the same rents and covenants,” the covenant for renewal ought to be inserted.

Cooke v. Booth (*c*), though decided chiefly on a principle which will be more particularly noticed in a future page (*d*), clearly admitted the propriety of the rule laid down in *Bridges v. Hitchcock*, that “under the same rents and covenants” included the covenant for renewal.

Should these cases (*Bridges v. Hitchcock*, *Furnival v. Crew*, and *Cooke v. Booth*.) be considered as having decided that a right to a fresh covenant to renew, and so *toties quoties*, arose from the words “under the same rents and covenants,” it is certain that more recent decisions are of a different tendency. One case (*e*), however, which came before Lord Macclesfield in the interval between *Bridges v. Hitchcock* and *Furnival v. Crew*, and seems to establish the reverse of the doctrine propounded by those cases, deserves to be fully mentioned, with a view to appreciate the remarks made on it by Lord Hardwicke in *Furnival v. Crew*. Skinner demised the house

(*a*) *Tritton v. Foote*, 2 Cox, 174.

(*b*) *Furnival v. Crew*, 3 Atk. 83;
S. C. 9 Mod. 446.

(*c*) *Cooke v. Booth*, Cowp. 819.

(*d*) *Post*, p. 725.

(*e*) *Hyde v. Skinner*, 2 P. Wms.
196; S. C. 1 Hargr. Jur. Arg. 425;
3 Hargr. Jurisc. Exerc. 193; 3 Ridgew.
P. C. 393.

in question to Hyde for five years, and covenanted to renew the lease at the same rent and on the same covenants, upon the request of Hyde within the term. Hyde died within the term, having laid out a considerable sum of money in improving the premises; and his executors, within the term, requested Skinner to make a new lease to them for fifty years, at the old rent. It was objected, that the request ought to have been made by the lessee himself, and not by his executors, who might be insolvent persons, and that the lessor might be in danger of losing his rent. The Lord Chancellor, however, said:—"The executors of every man are implied in himself, and bound without naming; and the meaning of this covenant was to the end the lessee might be reimbursed the money which he had laid out in the improvement of the premises, for which reason it is immaterial whether the testator or the executors required the renewal of the lease; it need not be personal. But then the request for making of a lease for fifty years is too much; for it might have been as well for 100 or 200 years; but, the usual term of leasing being for twenty-one years, let the defendant demise the premises to the plaintiff for twenty-one years, or for any lesser term as the plaintiff shall elect. And though the lease is to be made on the same covenants, yet that shall not take in a covenant for the renewing this new lease, forasmuch as then the lease would never be at an end". His Lordship then disposed of the objection that the executors might be insolvent. In answer to this case when it was quoted in *Furnival v. Crew*, Lord Hardwicke said, that it could not be applied as an authority in the case before him, nor could hardly be an authority in any; for the decree looked something more like an award and a compromise than a decree: and, though cited by counsel in the case of *Cooke v. Booth*, it was not noticed by the judges, their opinion being principally guided by the construction supposed to have been put on the covenant by the parties themselves.

In this case of *Hyde v. Skinner*, as well as in *Bridges v. Hitchcock*, previously noticed, the circumstance of the plaintiff

having expended money on the premises seems to have been taken into consideration in estimating his right; but there are later cases, decided independently of such particular circumstances, which establish the rule that the mere words “under the same rent and covenants” do not imply a repetition of renewals.

The case of *Davis v. the Taylors’ Company* (*f*), decided by Sir Joseph Jekyll in 1736, went to this extent. A lease was made by the defendants to the plaintiff’s testator, of a house for twenty-one years, with a covenant by the defendants, at the end of the first seven years, upon the surrender of that lease, to make a new lease for twenty-one years, “at the same rent and with the same covenants” as were reserved and contained in the old lease. The bill was for a specific performance of the covenant, and the question was, whether the covenant for renewal should be inserted in the new lease. The Master of the Rolls was of opinion that it should not, there being no words to show that it was the intention of the parties that the lease should be renewed *toties quoties*, for that in effect would be to give the plaintiff a fee; and he, therefore, decreed the defendants to make a new lease, but without the covenant for renewal.

Russell v. Darwin (*g*), before Lord Camden in 1767, was to the same effect. A lease was made to Richard Russell, his executors, &c., for ninety-nine years, if three persons or any of them should so long live, rendering rent; and the lessor covenanted, upon the death of any of the *cestuis que vie* (by name), to add a new third life, upon payment of 200*l.*, within six months; or, upon the death of two of them (by name), within six months to add two new lives, upon payment of 500*l.*; or upon the death of all of them (by name), upon payment of 1150*l.*, to make a new lease or grant for any three new lives to be nominated and appointed by the said Richard Russell, his executors, &c., for the like term as was thereby

(*f*) *Davis v. The Taylors’ Company*, cited from Melmoth’s *M.S. Reports*, 3 *Ridgew.* P. C. 395; S. C. 1 *Hargr. Jurid. Arg.* 427; 3 *Jurise. Exerc.* 195.

(*g*) *Russell v. Darwin*, 2 *Bro. C. C.* 638-9, 5th Ed. by Belt, n. (+); S. C. *Cowp.* 822.

demised, "at and under the like rent, covenants, and agreements therein contained." All three lives dropped, and the only question respecting the new lease was, whether it should contain a covenant for renewal, in the same words, or to the same effect, as that inserted in the original demise. Lord Camden was of opinion that the defendants were not under any obligation to grant any further lease than for three new lives only; and that the plaintiff was not entitled to have any covenant inserted for any further renewal, the words of the old covenant not obliging the lessors to grant a new lease but upon the death of some one of the three persons named in that lease; and, they being all dead, the plaintiff could claim no further renewal (*h*); and, therefore, his lordship decreed the defendants, upon payment to them of the fine of 1150*l.*, to grant to the plaintiff a new lease for ninety-nine years, renewable (*i*) on the deaths of three persons named in the prepared lease, but without any covenant for any further renewal.

In the next case of *Reece, or Rees, v. Lord Dacre* (*k*), the lessor covenanted, on the dropping of any two of the three lives on which the lease was held, to grant a new lease for ninety-nine years, if the two new lives and the old life, or either of them, should so long continue; such new lease to have and contain "the same covenants, reservations, provisoes, conditions, and agreements." The lessee filed his bill for a new lease, and insisted on the insertion of a fresh covenant for renewal. Lord Thurlow at first thought of dismissing it, but at last ordered the plaintiff to bring his action at law on the covenant. No action, however, was brought, and the plaintiff ultimately abandoned his claim, having consented to take a lease without the covenant for renewal.

In *Tritton v. Foote* (*l*), before Lord Thurlow in 1789, the

(*h*) So in the report. Should it not be, that the plaintiff could claim no further *covenant for* further renewal?

(*i*) So in the report, though, no doubt, a mistake for *determinable*.

(*k*) *Reece, or Rees, v. Lord Dacre*, 3 Hargr. Jurise. Exerc. 206-7; 237; S. C. 1 Hargr. Jurid. Arg. 438; 9 Ves.

332; 2 Bro. C. C. 638. A.D. 1788.

(*l*) *Tritton v. Foote*, 2 Bro. C. C. 636; S. C. 2 Cox, 174, where the judgment is more fully reported. And see Lord Brougham's remarks on this case in *Brown v. Tighe*, 8 Bli. P. C. N. S. 272, 287; S. C. 2 Cla. & Fin. 396.

lease was for twenty-one years, with a covenant by the lessor, at the end of the term to execute a new lease for the further term of seven years, to commence from the end of the former twenty-one; "subject to the same rents, and pursuant to the same exceptions, covenants, reservations, and conditions, and agreements, *in all respects*, as were contained in the original lease." The same question as before arose, the plaintiff having tendered a lease containing a covenant for granting a second lease for seven years, and filed his bill on its execution being refused. It will be observed, that the words in this case were more general and comprehensive than the words in the former cases: in addition to which, *Bridges v. Hitchcock*, *Furnival v. Crew*, *Cooke v. Booth*, and *Recce, or Rees, v. Lord Dacre*, were cited to the court in favor of the plaintiff; but, with a full knowledge of the preceding decisions, the Lord Chancellor said, that his present inclination was to dismiss the bill; but Mr. Mansfield suggesting that in that case the plaintiff would not have his lease for seven years, his lordship declared him entitled to a lease for seven years only; and said, that he had not an idea that the intention of the lessor was to renew the covenant of renewal, or that it could be so construed in a court of equity; and that he made this decree for the same reasons that Lord Mansfield gave in the case before him.

Baynham v. Guy's Hospital (*m*) seems also an authority for the same doctrine, though the point for the court to decide was, whether the lessee was not precluded by his own laches from obtaining any renewal at all. But his counsel are not reported to have urged his claim on the words "at and under the yearly rents and covenants hereinbefore reserved", contained in the covenant for renewal.

The next case on the subject is *Moore v. Foley* (*n*). Lord Foley granted certain premises to Robert Moore for the

(*m*) *Baynham v. Guy's Hospital*, 3 Ves. 295. A.D. 1796.

(*n*) *Moore v. Foley*, 6 Ves. 232. A.D. 1801. See Lord Brougham's remarks

on this case in *Brown v. Tighe*, 8 Bli. P. C. N. S. 272. 290; S. C. 2 Cla. & Fin. 396.

lives of his three children, Robert, James, and Mary, and of the longest liver of them, and covenanted, that when any one of the cestuis que vie should die, the survivors, within a year after the death of such one as should first happen to die, should pay to Lord Foley 42*l.* 6*s.*, and that Lord Foley, upon that payment, and surrender of the former lease, would grant another lease for the lives of the survivors, and the life of such other person as they should name, and the life of the longest liver of them, "at, for, and under the like rent, covenants, and conditions, as were therein contained and reserved": and moreover "it was mutually granted and agreed, that, in such grant to be made by Lord Foley, his heirs or assigns, unto Robert Moore, the elder, his heirs or assigns, it should be covenanted and agreed, that when and as often as any one of the said three persons for whose lives the said grant should be made should happen to die, then the survivors of them should, within one year after the death of such one person, pay to Lord Foley, his heirs or assigns, the sum of 42*l.* 6*s.*, and surrender the grant then in being, and Lord Foley, his heirs and assigns, should, upon the payment of the said money, and surrendering up of such grant, at the request and charges of the said survivors of such lessees, execute another grant unto the said survivors of such lessees, for and during the lives of such two of the said persons as should be then living, and for the life of such other person as the said survivors of the said lessees should nominate, 'under the like rents, covenants, provisoes, and conditions, as were therein contained'; provided that when any two of such persons for whose life such grant should happen to be made should happen to die within one year, and before such new grant ought to be made, according to the true meaning of the said lease, then the survivor of such lessees should, within one year next after the death of such second person of the said three persons for whose lives such grant should be made, pay to Lord Foley, his heirs or assigns, the sum of 102*l.* 6*s.*, and that Lord Foley, his heirs or assigns, should, upon receipt of the said money, and surrendering up of the grant then in

being, at the request and charges of such surviving lessee, execute another grant unto such surviving lessee, for the lives of such surviving lessee, and of such two other persons as such surviving lessee should nominate, 'at for and under the like rents, covenants, and conditions, as were therein mentioned and contained'. Provided, that if at any time Robert Moore, the elder, his heirs or assigns, should, upon the death of any one or more of them the said Robert, James, and Mary, neglect or refuse to pay to Lord Foley, his heirs or assigns, the said respective sums, or to surrender the grant then in being, and accept a new grant, it might be lawful for Lord Foley, his heirs and assigns, to enter and hold until he and they should have received the said several and respective sums with interest, and then he and they should make such grants, &c., as he and they ought to have made if the money had been paid at the time." Sir Wm. Grant was of opinion, upon the whole, that the lessee was entitled to the benefit of four renewals: one under the covenant in the original grant; then having got his three lives again, he had the stipulation for renewal when any one of them should die. "There being no words clear in this case," said his Honor, "nor any words relative to perpetual renewal; but the parties themselves having limited it, the question is, whether the proviso that the renewal shall be under the same rents, covenants, and conditions, as the first lease, shall, in the absence of more positive stipulation, amount to a perpetual renewal. Upon *Tritton v. Foote*, and *Russell v. Darwin*, I am bound to hold that a covenant for renewal under the same covenants does not include the covenant to renew, but that it means only a second lease, not a perpetuity of leases."

The next, and perhaps the strongest case, is *Iggulden v. May* (o), in which the naked point was presented to the court. The covenant, drawn with singular brevity and simplicity, provided, that at the end of eighteen years of the term of

(o) *Iggulden v. May*, 1 Ves. 325. In *point was raised, but not touched by Dowling v. Mill*, 1 Madd. 541, decided the decision. subsequently to *Iggulden v. May*, the

twenty-one years (for which the lease was granted), or before, upon request of the lessee, the lessor would seal and deliver to the lessee a new lease of the premises, for the like fine or consideration of 5*l.* 8*s.*, for the like time and term of twenty-one years, at the like yearly rent of 6*s.* 9*d.*, “with all covenants, grants, and articles”, as in the then present indenture were contained. The lease contained no other express covenant; a circumstance which was urged in argument for the plaintiff as decisive of the intention that every lease should include the covenant, and that there should be a perpetual renewal; as, unless that covenant were preserved, those words would be useless. Lord Eldon, admitting that the general doctrine on the general words was opposed to the readmission of the covenant for renewal in the renewed lease, was not sufficiently satisfied as to the legal meaning of the covenant; and therefore ordered the plaintiff’s bill to be retained for twelve months, with liberty to bring an action. The plaintiff then resorted to the court of King’s Bench (*p*), and afterwards carried the question on appeal to the Exchequer Chamber (*q*), in both of which courts judgment was given against him. In answer to the plaintiff’s argument that the word *covenants* could not be satisfied without the insertion of a covenant for renewal, it was said (*r*), “that that word would be literally satisfied by the lessor’s granting a lease with a covenant for good title, and quiet enjoyment, and the lessee himself being bound by no other covenant on his part than that contained in the first indenture, viz., to pay the rent; with power of entry and distress:”—In passing we may observe, that, as the first indenture contained no other express covenant than the one for renewal, the court, in alluding to the lessee’s covenant to pay rent, probably meant the implied covenant on the *Reddendum* (*s*).

Kenny *v.* Forde (*t*), determined in Ireland, is consistent with these decisions. There, a lease was made for the lives of

(*p*) 7 East, 237.

(*q*) 2 New Rep. 449.

(*r*) 7 East, 243-4. 2 New Rep. 452.

(*s*) See 9 Ves. 330; and post, Part

the Fifth, Ch. IX., as to the *Reddendum*.

(*t*) Kenny *v.* Forde, Batty, 534.

A., B., & C., and contained a covenant by the lessor with the lessees, their and every of their heirs, executors, administrators, and assigns, and with the survivor of them, that, at the death of any of the said three lives thereinbefore mentioned, their, or any, or either of their heirs, executors, administrators, and assigns, at all times thereafter, upon payment of one year's rent to the lessor, his heirs or assigns, it should be lawful for any and every of the surviving lessees, their or any or either of their heirs, executors, administrators, or assigns, to put in any new life as he or they should nominate and appoint; and the lands and premises therein before demised to be enjoyed during the said life, "at the rents, covenants, and reservations therein before expressed"; and on a case sent from the court of Chancery to the court of King's Bench in Ireland, the judges certified, that the covenant was not one for perpetual renewal. They also certified, that a former lease mentioned to have been surrendered as part of the consideration for the lease above mentioned, could not be resorted to for the purpose of expounding the covenant for renewal, and of giving to it its legal construction and effect.

The latest case (*u*) was peculiar in the language of the covenant on which the question arose. A lease was granted in 1663 of certain lands in the county of Carlow, in Ireland, and also of the timber then growing or lying thereon, with power to make sale and disposal thereof as the lessee, his executors, administrators, or assigns, should think fit, without impeachment of waste, they planting 500 trees of oak or ash in the room of them, for the term of ninety-eight years, at the yearly rent of 15*l.* for the first three years, and of 30*l.* for the remainder of the term; and the lessor covenanted, for himself, his heirs and assigns, upon request of the lessee, his executors, administrators, and assigns, from time to time to renew the said lease, and perfect such other *further* (*x*) assurances as the lessee, his executors, administrators, and assigns, should

(*u*) *Brown v. Tighe*, 8 Bli. P. C. N.S. 272; S. C. 2 Cla. & Fin. 396.

(*x*) The word *further* was in the

counterpart, but not in the part of the lease executed by the lessor. 2 Cla. & Fin. 398, n.

reasonably require, for the better strengthening, confirming, and sure making of the said demised premises unto the lessee, his executors, administrators, and assigns, "at such rents, and under such covenants as contained in the said indenture of lease," at the charge of the lessee, his executors, administrators, and assigns. In 1779, the lease was renewed for ninety-eight years, and the indenture contained all the same clauses, provisions, and covenants, as in the original lease, and, amongst them, a covenant for renewal in the same words as were contained in the original lease. The last-mentioned lease being within a few years of expiration, the lessee filed his bill in Ireland to enforce a renewal, which had been refused by the reversioner; but the court, though at first inclined to consider the covenant as amounting to an agreement for a perpetual renewal, upon further consideration held it to be a covenant for further assurance only; and the judgment was afterwards affirmed on an appeal to the House of Lords, great stress being laid on the provision requiring the lessee to plant 500 oak or ash trees in the place of those sold, which was deemed incompatible with the supposition that the lessor intended to part with his whole interest under a covenant for perpetual renewal.

On the whole, it is indisputably settled, that the words "under the same rent and covenants" are not of themselves sufficient to include the covenant for renewal(*y*). Nor will a covenant to grant a lease "in the same form" include the covenant for renewal(*z*).

Where a party covenanting to renew is prevented by a subsequent act of parliament from performing his contract to its full extent, the court will decree it to be specifically executed to such extent as remains lawful; as where the dean and chapter of St. Paul's, having, before the restraining act(*a*), made a lease of Doctors' Commons for ninety-nine

(*y*) And see *Earl of Inchiquin v. Burnell*, 3 Ridgew. P. C. 376; 3 Hargr. Jurisc. Exer. 173; 1 Hargr. Jurid. Arg. 411.

(*z*) *Iggulden v. May*, 2 New Rep. 452.

(*a*) 13 Eliz. c. 10.

years, with a covenant for renewal, at the expiration of that term, for ninety-nine years longer, were decreed to make a lease for forty years, which was allowed by the statute of 14 Eliz. c. 11 (*b*).

III.—*As to the acts of the parties being received in evidence in aid of construction.*

In this place we may notice how strongly the courts have generally opposed the doctrine, advanced in *Cooke v. Booth* (*c*), and apparently sanctioned by Lord Hardwicke (*d*), that the acts of the parties, or their impression of the effect of their covenant, could be admitted as a key to its construction. *Cooke v. Booth* was a case out of Chancery for the opinion of the court of King's Bench; in which it was stated, that a lease was granted for three lives, and that the lessor covenanted, that if the lessee, his heirs, &c., should be desirous, on the decease of the lives or any of them, to add one life to the then two in being, in lieu of the life so dying, then he, the lessor, on the surrender of the lease in being, and payment of a sum of money for every life to be added in lieu of the life of every of them so dying, would grant a new lease for the lives of the two persons named in the former lease as should be then living, and of such other person as the lessee, his heirs, &c., should name, in lieu of the person named in the preceding lease, as the same should respectively happen to die, under the same annual rent, and the same covenants therein contained. The lease bore date the 22nd of December, 1749, and there had been successive renewals, containing the

(*b*) *Betesworth, or Betsworth, v. The Dean and Chapter of St. Paul's*, Sel. Ca. in Ch. 66; S. C. 2 Eq. Ca. Ab. 26. pl. 30; S. C., on appeal, where the decree below was reversed, 3 Bro. P. C. 389; Toml. Ed. Vol. I, p. 240; Gro. & Rud. of Law & Eq. 254. In the book last named it is said, clearly by mistake, that the House of Lords de-

creed the Dean and Chapter to renew for twenty [instead of forty] years.

(*c*) Cowp. 819.

(*d*) *Furnival v. Crew*, 3 Atk. 88; S. C. 9 Mod. 446. The same mode of construction was adopted in the Irish House of Lords in *Atkinson v. Pilsworth*, 1 Vern. & Seriv. 157. 161. A.D. 1787.

same clause of renewal, from the time of a former lease granted by the ancestor of the lessor in 1688, down to the date of the lease in question; viz., a renewal by the lessor in 1725; another in 1746; another in 1748, which was granted to the lessee upon the same lives as the lease in question (*e*); and then the lease of December, 1749, was granted. Upon the fact of these repeated renewals the court gave their opinion in favor of a perpetual renewal. Lord Mansfield and Mr. Justice Ashhurst founded theirs entirely on that fact (*f*); declaring that the parties themselves had put the construction upon it; for there had been frequent renewals, and in all of them the covenant for renewal had been uniformly repeated. And Lord Mansfield asked, "How then shall the court say the contrary?" Mr. Justice Willes rested his opinion chiefly on that fact: and both he and Mr. Justice Buller considered the case governed by the decision in *Bridges v. Hitchcock*.

Not long afterwards, the court of King's Bench refused to admit evidence of the acts of the parties in aid of the construction of a covenant in unambiguous terms, though *Cooke v. Booth* was cited as an authority for such admission (*g*).

Sir R. P. Arden, M.R., afterwards Lord Alvanley, was the next to condemn this principle of construction. "I strongly protest," said his Honor (*h*), "against the argument used by the learned judges in *Cooke v. Booth*, Cowp. 819, as to construing a legal instrument by the equivocal acts of the parties, and their understanding upon it, which I will never allow to affect my mind. That case was sent to law by Lord Bathurst. The learned judges thought fit to return an answer to the Chancellor, that the legal effect was a perpetual renewal, upon the ground that, by voluntary acts which the parties might or might not have done, the parties themselves had put

(*e*) If for the same lives, of what use was the lease in question? *quære*.

(*f*) Lord Mansfield seems to have entertained a similar notion with regard to the powers in the case of *Taylor*

dem. Atkins v. Horde, 1 Burr. 60. 106.

(*g*) *Clifton v. Walmesley*, 5 Term Rep. 564.

(*h*) *Baynham v. Guy's Hospital*, 3 Ves. 298. *Eaton v. Lyon*, 3 Ves. 694.

a construction upon it. Mr. Justice Willes stated that as his only ground. Lord Mansfield made it his chief ground; but that ground was disapproved by Lord Thurlow, and is, I think, totally unfounded. I never will construe a covenant so. I never was more amazed; and Mr. Justice Wilson, who argued it with me, was astonished at it. When it came back, Lord Bathurst, not having retained the great seal long enough for it to come on again before him, it came before Lord Thurlow, who said, that, sitting as Chancellor, when he asked the opinion of a court of law, whatever his own opinion might be, he was bound by that of the court of law (*i*); therefore he decreed a renewal; but said he should be very glad if Mr. Booth would carry it to a superior tribunal. We had a consultation, and I wrote to Mr. Booth upon it, but he, being only tenant for life, refused to appeal."

Sir Wm. Grant also, who succeeded Sir R. P. Arden as Master of the Rolls, in commenting on the case, said (*k*):—"Even if the acts of the parties, which are said to have been upon this foundation of a perpetual renewal, were in evidence before me, I should not act upon them; for certainly that is not a very legal mode of construction, that a man having done an act without being bound to do it, or from mistake, shall therefore be bound for ever without the power of retracting."

Lord Eldon declared (*l*), that he never could assign a satisfactory reason why Lord Bathurst made those circumstances part of the case; and stated, as his opinion, that in no form of action would it be competent to bring upon the record the fact with reference to former leases, as explaining the contract contained in the last leases; an opinion in which it would seem (*m*) Lord Ellenborough coincided; and

(*i*) This was not the uniform practice of Lord Thurlow; for he sent the case of *Utterson v. Vernon*, 3 Term Rep. 539; 4 Term Rep. 570, twice to a court of law for their opinion. See 9 Ves. 329. At all events, this alleged practice of Lord Thurlow has not been followed by later judges. See Maxwell

v. Ward, 11 Pri. 18; S. C. 13 Pri. 674.

(*k*) *Moore v. Foley*, 6 Ves. 233. And see *Balfour v. Welland*, 16 Ves. 156.

(*l*) In *Iggulden v. May*, 9 Ves. 333.

(*m*) *Iggulden v. May*, 7 East, 244-5.

when the case of *Iggulden v. May* came before the Exchequer chamber on a writ of error (*n*), Sir James Mansfield, the organ of the court, pronounced the following words:—"It is true that similar renewals were allowed to operate upon the judgment of the court of King's Bench in *Cooke v. Booth*; but we think that was the first time that the acts of the parties to a deed were ever made use of in a court of law to assist the construction of that deed. Suppose the original lessor to have declared in the presence of fifty witnesses, that he intended to bind himself by the lease to a perpetual renewal; his declaration could not have been allowed to alter the construction of the lease itself. If so, why should the subsequent renewals, which are not evidence either so strong or so unequivocal as the declaration of the lessor, be allowed to alter the construction?" His lordship further declared, that the case had been impeached on all occasions, and that the court of King's Bench were misled by the renewals stated in the case sent from the court of Chancery" (*o*).

It is right, however, to notice some more recent cases, where the exploded mode of construction in *Cooke v. Booth* appears to have been revived. In one (*p*), the point for the consideration of the court was, whether an instrument amounted to an actual lease, or an agreement for a lease only; and L.C.J. Tindal said (*q*):—"Upon the general and leading principle in such cases, we are to look to the words of the instrument, and to the acts of the parties, to ascertain what their intention was; if the words of the instrument be ambiguous, we may call in aid the acts done under it as a clue to the intention of the parties." In another (*r*), various questions were presented for consideration, one of which was, whether an instrument operated as a yearly or quarterly

(*n*) 2 New Rep. 449, 451.

(*o*) See also the conclusion of Baron Smith's judgment in *Brown v. Tighe*, 2 Cl. & Fin. 405, 409, n.

(*p*) *Doe dem. Pearson v. Ries*, 3 Bing. 173; S. C. 1 Mo. & Sc. 259.

And see *Hancock v. Caffyn*, 3 Bing. 358; S. C. 1 Mo. & Sc. 521.

(*q*) 3 Bing. 161; 1 Mo. & Sc. 264.

(*r*) *Wilkinson v. Hall*, 3 Bing. N. C. 508; S. C. 4 Scott, 301.

letting; when his lordship, in the course of his judgment, said (s):—"Look again at the situation of the parties, which rendered it improbable the premises should be demised on a yearly holding, the lords of the Treasury being the owners, who purchased the property only for the purpose of disposing of it to advantage; and how much more easily would that be effected if they had the power of dismissing the occupier at the end of three months. But it does not rest there; for the same construction has been put on these deeds by the conduct of the parties themselves, the lords of the Treasury on the day they took the property having given notice to the defendants to quit at the end of a quarter, and the defendants having never objected to such notice." And the same learned judge again, in a case (t) relating to the legality of a distress, which depended on an instrument being a lease or only an agreement for one, said, that the court might look at the acts of the parties also; for there was no better way of seeing what they intended than seeing what they did under the instrument in dispute. And Park, J., also said, that the intention of the parties must be collected from the language of the instrument, and might be elucidated by the conduct they had pursued.

Pollock, L.C.B., too, in construing a covenant to carry on certain iron works, declared, that, in accordance with his interpretation of it, it appeared that the parties had so dealt with the covenant themselves for a considerable number of years while the lease was in operation (u).

In a later case (x), where the question was, whether an instrument operated as a lease or an agreement only, and it was argued, on the authority of *Wilkinson v. Hall*, that the acts of the parties, although subsequent to the commencement of the holding, might be taken into consideration; Lord Abinger, C. B., asked:—"Can it be said that the legal inten-

(s) 3 Bing. N. C. 531; 4 Scott, 333.

& Wel. 175. 193.

(t) *Chapman v. Bluck*, 4 Bing. N. C. 187; S. C. 5 Scott, 515; 1 Arn. 27.

(x) *Alderman v. Neate*, 4 Mees. & Wel. 704.

(u) *Foley v. Addenbrooke*, 13 Mees.

tion of the instrument is to be ascertained by the subsequent conduct of the parties"? and added, "all that the Chief Justice meant to say was, that the facts referred to by him strengthened his view of the intention of the instrument (*y*).

And in the subsequent case of *Doe v. Powell* (*z*), where it was argued, on the authority of *Doe v. Ashburner* (*a*), *Doe v. Ries* (*b*), and *Chapman v. Bluck* (*c*), that a letter written by a landlord subsequently to the instrument in question, showed that he understood it to amount to an actual lease, and not to an agreement only; Maule, J., declared, that the court could only look at the instrument itself and the subject-matter of the demise. "As to the materials (continued the learned Judge) to which the court is to refer in coming to a decision upon the construction of instruments of this nature, it has been contended by my Brother Wilde, that the intention of the parties may be collected from their subsequent conduct; and for this he mainly relies upon a dictum of my L. C. J. in *Doe dem. Pearson v. Ries*. In that case, the instrument had reference to the demise of a house which was at the time out of repair, and of which it was necessary that the tenant, by whom the repairs were to be done, should be in possession for the purpose of doing them for some time before he could have any beneficial occupation; and accordingly he was let into immediate possession, though the rent was not to commence until a future day. All that that case amounts to is this, that we are to take into consideration the state of the property, and not that collateral acts of the parties may be looked at for the purpose of ascertaining their intention at the time of contracting." Erle, J., also said, that extrinsic evidence was only admissible for the purpose of showing the state and circumstances of the premises, which could not appear from the instrument itself. And the L. C. J. (Tindal) himself, in modification of his former remarks, said,

(*y*) 4 Mees. & Wel. 716.

(*z*) *Doe dem. Morgan v. Powell*, 8 Scott's N. R. 687.

(*a*) *Doe dem. Jackson v. Ashburner*,

5 Term Rep. 168.

(*b*) *Doe dem. Pearson v. Ries*, sup. p. 728.

(*c*) *Chapman v. Bluck*, sup. p. 729.

that there were many cases (*Doe dem. Jackson v. Ashburner*, 5 T. R. 163, being one of the earliest,) where it had been held, that, in construing an instrument of this description, regard must be had to the intention of the parties; and that for this purpose the court must look at the instrument itself, and at the subject-matter to which it related; but that further or wider than that he was not prepared to say that they had any right to go.

In this view we may perhaps reconcile the remarks of Lord C. J. Tindal, and of Mr. Justice Park, in *Chapman v. Bluck*, with the opinions of Lord Alvanley, Sir W. Grant, Lord Eldon, Lord Ellenborough, and the other learned judges before named (*d*).

IV.—*As to the liabilities at law of the lessor, and persons claiming through or under him.*

If the lessor refuse to perform, or by alienation of his estate, or otherwise, render himself incapable of performing, his agreement, he is immediately liable to an action for damages for the breach (*e*); although, by repurchasing the estate before the time specified for renewal, he might restore his capacity to make the required lease (*f*). His executors and administrators are placed in the same situation (*g*). As to them, it is immaterial whether the contract be under seal or not; but his heir is not liable unless, in the first place, the contract be under seal; and, in the second, provide for its performance by the heir; and unless, in the third place, the heir take assets by descent from the covenantor (*h*).

The charge of the covenant runs with the reversion by

(*d*) See also *Bell dem. Smyth v. Nangle*, 1 Jebb & Sy. 199. 213.

(*e*) *Scot v. Mayn*, or *Main's case*, Cro. Eliz. 450; S. C. 2 And. 18. pl. 12; Jenk. Cent. 6, case 49, p. 256; affirmed, in error, Cro. Eliz. 479; 5 Co. 20, b.; Mo. 452; Poph. 109; cited, 2 Rol. 347-8. 408. Hardr. 387. *Walrond v. Hill*, Hutt. 48; S. C., nom. *Hill v. Waldron*,

Winch, 29.

(*f*) *Ibid.* *Ford v. Tiley*, 6 Barn. & Cres. 325; S. C. 9 Dow. & Ry. 448. *Roper v. Coombes*, 6 Barn. & Cres. 534.

(*g*) *Furnival v. Crew*, 3 Atk. 87; S. C. 9 Mod. 446.

(*h*) See as to the liability of the Heir, post, Part the Sixth, Chap. I.

virtue of the statute of 32 Hen. 8 (*i*), and subjects the assignee or purchaser of the reversion, whether it be a freehold or a chattel interest, to the claim of the lessee, and consequently to an action for refusing to renew (*k*). Should the assignee of the reversion, on the arrival of the period for renewal, refuse to perform the covenant, the lessee may sue, at his option, the assignee, or original lessor, or both at the same time. And should he commence a distinct action against each, and take several executions, the last taken in execution may have an *auditâ querelâ* (*l*), a proceeding nearly obsolete, from the indulgence now shown by the courts in granting summary relief upon motion (*m*). Should the original lessor be resorted to, it would seem that he might maintain an action on the case founded on the tort against the assignee, and recover not only the damages awarded to the lessee, but also all the costs which the lessor sustained in defending such action (*n*).

Hence, whenever a lessor who has covenanted for renewal disposes of the reversion, he should, if possible, shelter himself from future liability by procuring the lessee to release him from the future performance of the covenant. Without this precaution, his covenant will remain in full operation until it be performed and satisfied by the assignee.

Where a lessee of lands belonging to the Duchy of Cornwall covenanted with his under-lessee to apply for, and do his utmost endeavours to procure, a renewal of the letters patent under which he held the premises in question; it was held, that, although the performance of the covenant would have been excused by the refusal of the officers of the Duchy to grant a renewal, or by his declining to pay a fine extra-

(*i*) 32 Hen. 8. c. 34.

(*k*) *Isteed v. Stoneley*, 1 And. 32. Mo. 159. pl. 300. *Rubery v. Jervoise*, 1 Term Rep. 229. *Roe dem. Bamford v. Hayley*, 12 East, 469. *Vernon v. Smith*, 5 Barn. & Ald. 11. And see *Tanner, alias Davis, v. Florence*, 1 Ch. Ca. 259, where the Lord Keeper said, that a covenant to renew was a real covenant that bound the assignee [i.e.

of the reversion] at common law. But it is submitted that this position cannot be maintained.

(*l*) *Brett v. Cumberland, Cro. Jac.* 521-3. See *Whitway v. Pinsent*, Sty. 300.

(*m*) Archb. Prae. by Chit. 302, 7 ed.

(*n*) *Burnett v. Lynch*, 5 Barn. & Cres. 539; S. C. 8 Dow. & Ry. 368. *Hancock v. Caffyn*, 8 Bing. 358; S. C. 1 Mo. & Sc. 521.

grant and unreasonable in proportion to the value of the property, yet his refusal to pay a fine which fell short in amount of three years' annual value (*o*), which the court held to be reasonable, was a breach of the covenant; and it was further decided, that there was no better criterion or test of the real value of the premises than the rent actually received by the lessee from his under-tenants (*p*).

And here we may remark, that a covenant to procure a renewal to be granted to trustees is not performed at law by the covenantor's obtaining a renewal in his own name, and offering to assign the lease to them (*q*).

v.—As to the rights at law of the lessee, and persons claiming through or under him.

The right of renewal constitutes a part of the tenant's interest in the land; and the grant of the additional term is, for many purposes, considered as a continuation of the former lease (*r*).

If there be nothing in the lease to show that the renewal was intended to be confined personally to the lessee, the right under the covenant may devolve on his executors, without their being particularly named (*s*).

In a word, whoever takes the lease takes also an interest

(*o*) *Simpson v. Clayton*, 4 Bing. N. C. 758; S. C. 6 Scott, 469; 1 Arn. 299. The mode of calculating the fines to be paid on leases of lands in Devonshire for long terms determinable on lives is as follows:—The gross annual value is first taken; then the amount of the land-tax, church-rates, poor-rates, reserved rent and repairs, is deducted to ascertain the clear value thereof, and about seventeen years' purchase of the clear value is charged on a lease for three lives of the purchaser's nomination. The number of years' purchase of leases for reversionary interests must in all cases depend upon the ages of the life or lives in existence at the time.

Attorney-General v. Cross, 3 Meriv. 536.

(*p*) *Simpson v. Clayton*, sup.

(*q*) *Seudamore v. Stratton*, 2 Bos. & Pul. 455.

(*r*) *Winslow v. Tighe*, 2 Ball & Beat. 195. 205. *Rawe v. Chichester*, 2 Ambl. 715. 719; S. C. 1 Bro. C. C. 198, n.; S. C., nom. *Bromfield v. Chichester*, or *Raw v. Duthelly*, 2 Dick. 480. *Randall v. Russell*, 3 Meriv. 197. See post, p. 762.

(*s*) *Hyde v. Skinner*, 2 P. Wms. 196; S. C. 1 Hargr. Jurid. Arg. 425; 3 Jurisc. Exere. 193. *Isteed v. Stonley*, 1 And. 82. *Roe dem. Bamford v. Hayley*, 12 East, 469.

in the renewal. The benefit, running with the land, is transmitted by assignment (*t*); and an assignee of an undivided share may maintain an action for a breach in respect of that share (*u*).

Where a condition precedent is to be performed on the lessee's part, as to surrender his existing term, to request a renewal, to tender a new lease, to pay a certain fine, or the like, he must, at law, strictly comply with the condition to establish his right to the renewal, or to an action for the lessor's neglect or refusal (*x*). Accordingly, where a lease was granted for sixty-one years, and the lessors covenanted that, at any time within one year after the expiration of twenty years of the said term of sixty-one years thereby granted, at the request and costs of the lessee, and on his paying to the lessors 6*l.*, they would, upon such request and payment, execute another lease for the further term of twenty years, to commence from and after the expiration of the said term of sixty-one years thereby granted; and so in like manner at the end and expiration of every twenty years during the said term of sixty-one years thereby granted, for the like consideration, and upon the like request, would grant another lease of the premises to the lessee, for the further term of twenty years, to commence at and from the expiration of the term then last before granted, at the like rent, &c.; it was held, that as the lessee had omitted to apply for a renewal at the expiration of the first and second twenty years of the term, he could not claim a renewal at the expiration of the third twenty years; and that as the lessor's agreement was to grant a further lease on a condition precedent, to be performed by the lessee, the latter had forfeited his right by his own neglect (*y*).

(*t*) *Isted v. Stoneley*, 1 And. 82. *Furnival v. Crew*, 3 Atk. 88; S. C. 9 Mod. 446. *Roe dem. Bamford v. Hayley*, 12 East, 469. *Vernon v. Smith*, 5 Barn. & Ald. 11. *Kerne's case*, Mo. 27, *semb. cont.*

(*u*) *Simpson v. Clayton*, 4 Bing. N.C. 758. 780; S. C. 6 Scott, 469; 1 Arn. 299.

(*x*) *Rubery v. Jervoise*, 1 Term Rep. 229. And see *Baynham v. Guy's Hospital*, 3 Ves. 295. *Eaton v. Lyon*, 3 Ves. 692. *Mackay v. Mackreth*, 2 Chit. 461. *Firman v. Lord Ormonde*, 1 Beat. 347. 350.

(*y*) *Rubery v. Jervoise*, 1 Term Rep. 229.

But if the lessor, by alienation, or otherwise (*z*), render himself incapable of fulfilling his agreement, an offer on the tenant's part to perform a condition precedent, as a preliminary step to an action, may safely be dispensed with (*a*).

Except with regard to construction, recourse is seldom had to a court of law in questions relating to renewals, as equity affords more substantial relief, by a specific performance of the contract itself, than can be obtained at law by an unsatisfactory award of pecuniary compensation; and, notwithstanding Lord Thurlow's condemnatory remark (*b*), the practice of equity in matters of this kind is too firmly established to be shaken. This subject will be pursued in the next division.

VI.—*As to the liabilities in equity of the lessor, and persons claiming through or under him, considered particularly with reference to specific performance of the contract to grant a renewal.*

The lessor, of course, is bound by his covenant specifically to renew; and where one A., holding under a corporation, (of which he was a member,) and in the habit of obtaining renewals on favorable terms, demised to B. at a certain rent, with a covenant to renew at the same rent as often as the corporation should renew to him; A. was compelled to renew to B. on the former terms, although the corporation raised the rent payable by A. (*c*); though it appears that he might have avoided a specific performance, by abandoning his lease, and allowing the covenantee to stand in his place (*d*).

A late act of parliament (*e*) has made provision for renewals

(*z*) See ante, p. 731.

(*a*) *Scott v. Mayn*, or *Main's case*, Cro. Eliz. 450; S. C. Jenk. cent. 256; affirmed in error, Cro. Eliz. 479; 5 Co. 20, b.; Mo. 452; Poph. 109; cited, 2 Rol. 402; Hardr. 387. *Hotham v. The East India Company*, 1 Term Rep. 638.

(*b*) Ante, p. 708.

(*c*) *Evans v. Walshe*, 2 Scho. & Lef. 419. *Revell v. Hussey*, 2 Ball & Beat. 280.

(*d*) Ibid.

(*e*) 11 Geo. 4 & 1 W. 4, c. 65, which repealed, but incorporated the provisions of, the statutes, 29 Geo. 2. c. 31; 11 Geo. 3. c. 20; 43 Geo. 3. c. 75, s. 4; and 9 Geo. 4. c. 78.

of leases granted by infants, femmes covert, idiots, lunatics, persons of unsound mind, and persons out of the jurisdiction of the court; and, after declaring (*f*) that the provisions of the act relating to a lunatic should extend to and include any idiot or person of unsound mind, or incapable of managing his affairs, unless there should be something in the subject or context repugnant to such construction, enacted,

By section 16, That when any person being under the age of twenty-one years, or a feme covert, might, in pursuance of any covenant or agreement, if not under disability, be compelled to renew any lease made or to be made for the life or lives of one or more person or persons, or for any term or number of years absolute, or determinable on the death of one or more person or persons, it should be lawful for such infant, or his guardian in the name of such infant, or such feme covert, by the direction of the court of Chancery, to be signified by an order to be made in a summary way upon the petition of such infant, or his guardian, or of such feme covert, or of any person entitled to such renewal, from time to time to accept of a surrender of such lease, and to make and execute a new lease of the premises comprised in such lease for and during such number of lives, or for such term or terms determinable upon such number of lives, or for such term or terms of years absolute, as was or were mentioned in the lease so surrendered at the making thereof, or otherwise as the court by such order should direct:

By sect. 18, That where any person who, in pursuance of any covenant or agreement in writing, might, if within the jurisdiction and amenable to the process of the court of Chancery, be compelled to execute any lease by way of renewal, should not be within the jurisdiction, or not amenable to the process, of the said court, it should be lawful for the said court of Chancery, by an order to be made upon the petition of any person or any of the persons entitled to such renewal, (whether such person should be, or should not be

under any disability,) to direct such person as the said court should think proper to appoint for that purpose, to accept a surrender of the subsisting lease, and make and execute a new lease in the name of the person who ought to have renewed the same; and that such deed executed by the person so appointed should be as valid as if the person in whose name the same should be made had executed the same, and had been alive, and not under any disability; but that in every such case it should be in the discretion of the said court of Chancery, if under the circumstances it should seem requisite, to direct a bill to be filed to establish the right of the party seeking the renewal, and not to make the order for such new lease unless by the decree to be made in such cause, or until after such decree should have been made:

By section 19, That where any person being lunatic was or should be entitled, or had a right, or in pursuance of any covenant or agreement might, if not under disability, be compelled, to renew any lease made or to be made for the life or lives of one or more person or persons, or for any term or number of years absolute, or determinable on the death of one or more person or persons, or otherwise, it should be lawful for the committee of the estate of such lunatic, in the name of such lunatic, by the direction of the Lord Chancellor, entrusted by virtue of the King's sign manual with the care and commitment of the custody of the persons, and estates of the persons, found idiot, lunatic, or of unsound mind, to be signified by an order to be made in a summary way upon the petition of such committee, or of any person entitled to such renewal, from time to time to accept of a surrender of such lease, and to make and execute to any person a new lease of the premises comprised in such lease to be surrendered by virtue of the act, for and during such number of lives, or for such term or terms of years determinable upon such number of lives, or for such term or terms of years absolute, as were mentioned or contained in such lease so surrendered at the making thereof, or otherwise as the Lord Chancellor so entrusted by such order should direct;

and that this provision should extend as well to cases where the lunatic should not be compellable to renew, but it should be for his benefit to do so, as to cases where a renewal might be effectually enforced against the lunatic, if of sound mind :

By section 20, That no renewed lease should be executed by virtue of the act, in pursuance of any covenant or agreement, unless the fine (if any), or such other sum or sums (if any), as ought to be paid on such renewal, and such things (if any) as ought to be performed in pursuance of such covenant or agreement by the lessee or tenant, should be first paid and performed, and that counterparts of every renewed lease to be executed by virtue of the act should be duly executed by the lessee :

By section 21, That all fines, premiums, and sums, which should be had, received, or paid, for or on account of the renewal of any lease, after a deduction of all necessary incidental charges and expenses, should be paid, if such renewal should be made by or in the name of an infant, to his guardian, and be applied and disposed of for the benefit of such infant, in such manner as the said court should direct ; if such renewal should be made by a feme covert, to such person or in such manner as the said court should direct for her benefit ; if such renewal should be made in the name of any person out of jurisdiction, or not amenable as aforesaid, to such person or in such manner, or into the court of Chancery to such account, and to be applied and disposed of, as the said court should direct ; and that if such renewal should be made in the name of a lunatic, to the committee of the estate of such lunatic, and be applied and disposed of for the benefit of such lunatic in such manner as the Lord Chancellor so intrusted should direct ; but that, upon the death of such lunatic, all such sum and sums as should arise by such fines or premiums, or so much thereof as should remain unapplied for the benefit of such lunatic at his death, should, as between the representatives of the real and personal estates of such lunatic, be considered as real estate, unless such lunatic should be tenant

for life only, and that then the same should be considered as personal estate :

By section 31, That every surrender, and lease, agreement, conveyance, mortgage, or other disposition, respectively granted, and accepted, executed, and made, by virtue of the act, should be and be deemed as valid and effectual to all intents and purposes as if the person by whom, or in whose place, or on whose behalf, the same respectively should be granted, or accepted, executed, and made, had been of full age, unmarried, or of sane mind, and had granted, accepted, made, and executed, the same, and that every such surrender and lease respectively made and accepted by or on behalf of a feme covert should be valid without any fine being levied by her (*g*) :

By section 36, That the powers and authorities given by the act to the court of Chancery in England should extend to all land within any of the dominions, plantations, and colonies, belonging to the crown, except Scotland :

By section 38, That the powers and authorities given by the act to the courts of Chancery and Exchequer in England, should and might be exercised in like manner, and were thereby given to, the courts of Chancery and Exchequer in Ireland, with respect to land in Ireland :

By section 39, That the powers and authorities given by the act to the Lord Chancellor of Great Britain so intrusted, should extend to all land wheresoever within any of the dominions, plantations, and colonies, belonging to the crown, except Scotland and Ireland :

By section 40, That the powers and authorities given by the act to the Lord Chancellor of Great Britain so intrusted, should and might be exercised in like manner by, and were thereby given to, the Lord Chancellor of Ireland, so intrusted, with respect to all land in Ireland, but not farther or otherwise :

By section 42, That the powers and authorities given by

(*g*) Fines were abolished, and more simple modes of assurance substituted, by 3 & 4 Wm. 4. c. 74.

the act to the Lord Chancellor of Great Britain so intrusted, should and might be exercised in like manner by, and were thereby given to, the lord keeper or commissioners of the great seal of Great Britain for the time being entrusted as aforesaid; and that the powers and authorities given by the act to the Lord Chancellor of Ireland so intrusted, should and might be exercised in like manner by, and were thereby given to, the lord keeper or commissioners of the great seal of Ireland for the time being so intrusted.

The provisions of the act respecting original leases of the lands of infants, persons of unsound mind, and of femes covert, will be found in an earlier part of this work (*h*).

Where a receiver applied to the court of Chancery in Ireland for a reference to the Master to ascertain whether a lunatic was bound to grant a renewal, Sir Edward Sugden, C., refused him the costs of the application, as he ought in the first instance to have applied to the committee to bring the subject before the court (*i*).

The covenantor's heir, in case of an estate in fee-simple descending on him, or an estate pur autre vie devolving on him as special occupant, is bound in like manner. The liability extends also to his executors and administrators in the case of a chattel interest of the reversion, or an estate pur autre vie devolving on them; as, on the other hand, a specific performance of a contract to take a renewal will be decreed against the lessee's executors, if they have assets; the plaintiff offering to permit their covenants to be so qualified as to render them no further liable thereon, than they would have been on the covenants which ought to have been entered into by the testator, in case a proper lease had been made to him in his lifetime (*k*).

A lessee for a term of years, with a *toties quoties* covenant for renewal, having died intestate, his administratrix underlet

(*h*) As to leases by Infants, ante, p. 28; by Persons of unsound mind, ante, p. 37; and by Femes covert, ante, p. 48.

(*i*) Re Doolan, 2 Con. & Law. 232; S. C. 3 Dru. & War. 442.

(*k*) Phillips v. Everard, 5 Sim. 102.

the premises at an increased rent, with a covenant that she, her executors, administrators, and assigns, as often as she or they should obtain a renewal, would execute to the underlessee a new lease for such term, save one year, as the said administratrix should herself procure, at the like yearly rent &c. Upon her death, administration *de bonis non* was obtained by the defendant, who it was contended was not affected by the covenant of the administratrix; but it was held, that the act of the administratrix was both a legal and equitable disappropriation of this property from the assets of the intestate; and that the defendant, who had entered into the receipt of the rents reserved by the underlease, had no right to do so unaffected by the acts and covenants of the administratrix; and that the lands were in his hands bound by the covenant if they were so in hers (*l*).

But the issue of a tenant in tail who covenants to renew are not bound to perform his contract, for they claim *per formam doni*, and paramount the covenant (*m*).

When the covenantee pays a valuable consideration, he, and all persons claiming under him, being considered as purchasers *pro tanto*, are entitled to a renewal against a person claiming under a prior voluntary conveyance from the covenantor (*n*).

In point of liability, a purchaser of the reversion is differently circumstanced at law and in equity. At law, as we have seen (*o*), he is subject, by virtue of the statute of 32 Hen. 8 (*p*), to an action for damages for refusing to renew, whether he had notice or not of the vendor's covenant to that effect; but in equity, where relief unattainable at law is sought, and the various modifying circumstances of the case are taken into consideration, the lessee must establish

(*l*) *Hackett v. McNamara*, Lloyd & Goo. temp. Plunk. 283. But see *Magrane v. Archbold*, 1 Dow, P. C. 107; ante, p. 709.

(*m*) See *Earl Brook v. Bulkeley*, 2 Ves. 498. *Earl of Shelburne v. Bidulph*, 4 Bro. P. C. 594; Toml. Ed.

Vol. 6, p. 356; Jour. Vol. 27, p. 226, 231.

(*n*) *Furnival v. Crew*, 3 Atk. 83; S. C. 9 Mod. 446. See also *Ashton v. Bretland*, 9 Mod. 58; S. C. 2 Eq. Ca. Ab. 57. pl. 7.

(*o*) Ante, p. 731-2.

(*p*) 32 Hen. 8. c. 34.

his right, by fixing the purchaser with previous notice of his (the lessee's) claim. A purchaser with notice must renew. Thus, where the lessee of college lands granted an underlease, and covenanted to renew his own lease, and to grant an additional term of three years to his underlessee, and afterwards obtained a renewal, but assigned over the renewed term without adding the three years; the assignee, having notice of the underlessee's claim, was compelled to perform the covenant (*q*).

The same equity extends against a party claiming as a jointress, or as tenant in tail, under a settlement made subsequently to the lease and covenant for renewal (*r*); against a purchaser from tenant in tail, who had granted a lease with such a covenant (*s*); and also against a purchaser from a tenant in tail, who had covenanted to renew a lease originally granted with a covenant for renewal by his father, tenant for life with power of leasing, though the father's covenant was void as to his son, the vendor (*t*).

So, where an estate was settled to the use of the settlor for life, remainder to his son for life, remainder to the first and other sons of the marriage of his son in tail male, with remainder to the settlor in fee, with the usual estates to trustees to preserve contingent remainders, and two intervening terms to trustees, and with a power of leasing to the father and son successively; and the father exceeded his power by granting leases for ninety-nine years if three persons should so long live, and covenanting, upon the death of either of the persons named, and surrender of the existing lease, to grant a new lease, and so upon the death of either of the persons to be named in any future lease or leases; and afterwards, in pursuance of a power of sale reserved to him and his son, they sold the estate with notice; it was held, that the purchaser was bound to perform the covenant to its full extent. It was argued that the effect of the notice could

(*q*) *Finch v. The Earl of Salisbury*,
Finch, 212.

(*r*) *Tanner, alias Davis, v. Florence*, 1 Ch. Ca. 259. *Ashton v. Bret-*

land, 9 Mod. 58; S. C. 2 Eq. Ca. Ab.
57. pl. 7.

(*s*) *Earl Brook v. Bulkeley*, 2 Ves. 498.

(*t*) *Ibid*.

only be notice that the party had executed a lease; and being tenant for life, the notice could only convey an idea that the lease was such as, in equity, and according to his estate, the tenant for life was enabled to make; but, said Lord Loughborough:—"The notice in all these cases is not the title to make it, but that such lease in fact exists; and the argument cannot apply to actual notice interposed before payment of the money and execution of the deed. The matter was entire, and the purchaser might have retained, if he could have qualified his refusal. The great argument is, that as the leases would have been void as against the son and issue in tail, they cannot extend further than such an interest as Wood, the tenant for life, could give under the terms of the power. It is supposed under that, that the son would have had a right to decline performance of the covenant, and even to enter upon the tenants claiming under the leases, if they were a contravention of the power; for they were void at law; and that the trustees to protect the issue in tail would have had a right to enter to avoid these leases. I admit it; but upon what ground does Stibbert, the purchaser, take to himself that right? These leases are not void: undoubtedly they are good for the life of Wood; and if the intermediate estates should fail in his life, and an estate should be taken after his death under his reversion in fee, they would be good to all intents and purposes. They are not void, therefore, in themselves, but they are voidable unquestionably, where they interfere with the interests of parties claiming under the consideration of the marriage settlement. Therefore the issue in tail may avoid them; but how that consideration can reach a person not standing under that consideration, how it can affect the interest of an estate taken totally out of the settlement by execution of the power to sell, I cannot conceive. When that power is executed, the estate is taken out of the settlement: the only claim under the settlement is as to the price". Specific performance was ultimately decreed(*u*).

(*u*) *Taylor v. Stibbert*, 2 Ves. Jun. 437. *Daniels v. Davison*, 16 Ves. 249. 254; S. C. 17 Ves. 433.

All the cases just cited in which a specific performance was obtained proceeded on the ground of notice; and, notwithstanding an early case (*x*), in which a decree was made apparently without reference to that circumstance, it is apprehended that equity would not compel a renewal against a purchaser who was ignorant of the existence of the covenant.

Hence, should a purchaser without notice refuse to renew, the lessee must obtain redress by an action at law either against such purchaser, or the lessor.

It is material, however, to mention, that as notice of the existence of a lease is notice of all its contents (*y*), so the possession of a tenant even under an agreement for a lease is sufficient to put a purchaser on inquiry, and, consequently, to fix him with notice of the terms of the agreement (*z*); but if, at the time of the purchase, the tenant in possession be not the original lessee, but merely hold under a derivative lease, and have no knowledge of the covenant contained in the original lease, it has never been considered that it was want of due diligence in the purchaser, which is to fix him with implied notice, if he do not pursue his inquiries through every derivative lessee, until he arrive at the person entitled to the original lease, which can alone convey to him information of the covenant (*a*).

Where the renewal is sought against one who was a stranger to the original lease, but who has afterwards agreed to renew, the plaintiff must prove a consideration to support such agreement, as a mere voluntary agreement is *nudum pactum*, which a court of equity will not order to be specifically executed. Thus, a tenant for life granted a lease for thirty-one years, and covenanted that his son, the remainder-man, when of age, should confirm it. Soon after the son attained his majority,

(*x*) *Richardson v. Sydenham*, 2 Vern. 447; S. C. 1 Eq. Ca. Ab. pl. 5. The point of notice was not expressly adverted to in *Ashton v. Bretland*, cited sup. p. 742.

(*y*) *Tanner, alias Davis, v. Florence*, 1 Ch. Ca. 259. *Taylor v. Stibbert*, 2 Ves. jun. 437. *Hall v. Smith*, 14 Ves.

433. *Daniels v. Davison*, 16 Ves. 249; S. C. 17 Ves. 433.

(*z*) *Ibid.* *Hanbury v. Litchfield*, 2 Myl. & Keen, 629.

(*a*) *Hanbury v. Litchfield*, 2 Myl. & Keen, 629. 633. And see ante, p. 362-3.

the lessee wrote to him, stating the agreement with his father, and that in consequence of it he had laid out considerable sums; and the defendant wrote in answer:—"The agreement certainly does not bind me; but the money you have laid out certainly entitles you to a renewal from me, which I shall be happy to give you on this consideration." For the plaintiff it was contended, that as he had laid out money in consequence of the agreement, it would be a fraud not to carry it into execution; but the court held, that the intention of laying out further sums not being mentioned in the letter, the promise was *nudum pactum*, which equity would not perform *in specie*; and that the circumstance of subsequent expenditure, as it was voluntary, could not vary the nature of the case. It was admitted, however, that had the promise to renew been founded upon an expressed intention to lay out more money, the plaintiff would have been entitled to a specific performance (*b*).

To the same effect is a more recent case (*c*). Sir Charles Mill, being tenant for life, with remainder to such uses as his son (the defendant), in case he should survive his father, should appoint, with remainder to the father in tail general, with remainder to the survivor in fee, on the falling of a life named in a lease granted by the father in 1777 for ninety-nine years determinable on three lives, and in consideration of 20*l.*, renewed that lease; with an habendum, from the expiration thereof, two of the lives being then in existence, for the term of ninety-nine years if J. D., a new life, should so long live; and in the lease was contained a covenant for renewal in the same terms as were used in the preceding demise in 1777. A memorandum of the same date as the lease was indorsed on it in the following words: "I Charles Mill, of &c., son and heir apparent of the within-named Sir Charles Mill, do hereby give my free consent to the grant of the

(*b*) Robertson v. St. John, 2 Bro. C. C. 140. And see Taylor v. Dulwich Hospital, 1 P. Wms. 655-6; S. C. 2 Eq. Ca. Ab. 198. pl. 2. Pilling v. Armitage, 12 Ves. 78; and Blakeney v.

Bagott, 3 Bli. P. C. N. S. 237. See also Fitzgerald v. Lord Portarlington, Jo. Ir. Exch. 431.

(*c*) Dowling v. Mill, 1 Madd. 541.

within written indenture of lease, and the premises therein mentioned, for the term therein likewise mentioned. Witness my hand the day of the date within mentioned." A bill being filed for a specific performance of the covenant, the question was, whether the defendant was to be considered as a party to, or bound by the lease. Sir Thomas Plumer, V.C., held, that the indorsement did not make the defendant a party to the lease; and that it was not an agreement to grant a new lease on the determination of that term, but simply an expression of the defendant's consent to a grant of the term mentioned in the lease, namely, a term for ninety-nine years determinable on three lives; and that the memorandum endorsed, being destitute of consideration, amounted merely to a voluntary gratuitous consent to the lease, and cast no obligation on the defendant to renew.

So, where a lease not warranted by a power was granted by a tenant for life, containing a covenant for perpetual renewal, it was held that the remainder-man, by accepting the reserved rent for many years after he came into possession, did not confirm it so far as to make the covenant for renewal binding on him (*d*); though, under the peculiar circumstances of the case of *Earl Brook v. Bulkeley* (*e*), where a father, tenant for life, with a common power of leasing, with remainder to his son in tail, granted a lease, and *covenanted* (*f*) to renew, and the son, after his father's death, entered into a similar covenant, a renewal was decreed against the son. "Though it is true," said Lord Hardwicke, "that the son is not bound by the covenant of his father, as his father exceeded his power, yet, as he was entitled to his father's estate, whatever assets his father left, either real or personal, would be liable to that covenant. A bill might be brought for a satisfaction out of assets, or an action for damages on the foot of that covenant; and therefore the son,

(*d*) *Higgins v. Rosse*, 3 Bli. P. C. 112.

(*e*) *Earl Brook v. Bulkeley*, 2 Ves. 498.

(*f*) An express covenant is binding *at law* without any consideration. See *Shubrick v. Salmon*, 3 Burr. 1637-9. *May v. Trye*, Freem. K. B. 447.

partly in point of honor to satisfy the covenant of his father, and partly to deliver himself from such a litigation and trouble, covenanted. If so, then I am of opinion that is a sufficient consideration to bind him."

VII.—*As to the rights in equity of the lessee, and persons claiming through or under him.*

We now proceed to inquire, in favor of whom the contract to take a renewal runs in point of benefit in equity: in other words, in whose favor a specific performance will be decreed; a branch of our subject more easily explained by first taking the converse, and showing in whose favor a specific performance will not be decreed; though for an exposition of the general principles on which the court decrees a specific performance of an agreement for a lease the reader is referred to a previous chapter (*g*).

It seems to be admitted that a party who has treated the land in an unhusbandlike manner, or been guilty of breaches of covenant which confer a right of re-entry on the lessor, has no claim to this species of equitable assistance (*h*); unless the covenant broken be of such a kind as would warrant the court in granting an injunction to restrain an ejectment, should the lessor, under the clause of re-entry, (in the case of an actual lease,) try to evict the lessee for a breach.

Where the assignees of a bankrupt or insolvent seek a specific performance, it is, I apprehend, immaterial whether they require an original lease under an agreement, or a renewed lease under a covenant or agreement for renewal; the same rules of equity being apparently applicable to both cases. On this subject, therefore, I shall merely refer the reader to a prior chapter where the cases have already been examined at some length (*i*).

If the lessee be guilty of fraud by wilfully concealing the fact of the cestui que vic being dead, or at the point

(*g*) Ante, p. 621.

(*h*) Ante, p. 636.

(*i*) Ante, p. 629, *et seq.*

of dissolution, and act under such concealment for his own advantage, the court will not compel the lessor to renew: on the contrary, he may take advantage of the forfeiture, and eject the lessee (*k*).

But where a lease has been actually granted at an inadequate fine, on the fraudulent representation of the lessee that only one life on which the lease was granted had fallen, when in fact two of the *cestuis que vie* were dead, equity will compel him to pay the additional sum which he would have been bound to pay, had the circumstances been fairly stated to the lessor, with interest at 4 per cent. (*l*). Nor will the lessee be allowed the option of rescinding the contract, and holding under his old lease (*m*). In the case cited, the lessee's ignorance, at the time of the execution of the new lease, of the second *cestui que vie*'s death did not avail him, as he was aware of the circumstance at the time of the lease being actually delivered up to him by the lessor; for although the fraud originated after the execution of the deed, yet as before its delivery to the lessee he concealed a fact, which would have induced the lessor, had he been made acquainted with it, to withhold such delivery, the lease was in a correct sense of the word *obtained* by fraud (*n*).

An act of parliament (*o*), already referred to (*p*), has also made provision for renewals of leases taken by infants, *femes covert*, idiots, lunatics, and persons of unsound mind. And it was enacted (*q*), that in all cases where any person being under the age of twenty-one years, or a *feme covert*, was or should become entitled to any lease or leases made or granted, or to be made or granted, for the life or lives of one or more person or persons, or for any term of years either absolute or determinable upon the death of one or more persons or person, or otherwise, it should be lawful for such person under

(*k*) *Pendred v. Griffith*, 4 Bro. P. C. 512; S. C. Toml. Ed. vol. 1, p. 314; Journ. vol. 26, p. 333. *Ellard v. Llandaff*, 1 Ball & Beat. 241.

(*l*) *Lord Abingdon v. Butler*, 3 Bro. C. C. 112; S. C. 1 Ves. jun. 206; 2

Cox, 260.

(*m*) *Ibid.*

(*n*) *Ibid.*

(*o*) 11 Geo. 4 & 1 W. 4, c. 65.

(*p*) *Ante*, p. 529.

(*q*) Sect. 12.

the age of twenty-one years, or for his or her guardian, or other person on his behalf, and for such feme covert, or any person on her behalf, to apply to the court of Chancery in England, and the courts of equity of the counties palatine of Chester, Lancaster, and Durham (*r*), respectively, as to land within their respective jurisdiction, by petition or motion in a summary way; and that, by the order and direction of the said courts respectively, such infant, or feme covert, or his guardian, or any person appointed in the place of such infant or feme covert by the said courts respectively, should and might be enabled from time to time by deed or deeds to surrender such lease or leases, and accept and take, in the place and for the benefit of such person under the age of twenty-one years, or feme covert, one or more new lease or leases of the premises comprised in such lease surrendered by virtue of the act, for and during such number of lives, or for such term or terms of years determinable upon such number of lives, or for such term or terms of years absolute, as was or were mentioned or contained in the lease or leases so surrendered at the making thereof respectively, or otherwise, as the said courts should respectively direct:

And (*s*) that in all cases where any person being lunatic should become entitled to any lease or leases made or granted, or to be made or granted, for the life or lives of one or more person or persons, or for any term of years either absolute, or determinable upon the death of one or more person or persons, or otherwise, it should be lawful for the committee of the estate of such person to apply to the Lord Chancellor of Great Britain, being entrusted by virtue of the King's sign manual with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind, by petition or motion in a summary way; and that, by the order and direction of the said Lord Chancellor so entrusted, such committee should and might be enabled

(*r*) And also of the courts of Great Session of the principality of Wales before their abolition by 11 Geo. 4 & 1 W. 4, c. 70. s. 14.
(*s*) Sect. 13.

from time to time, by deed or deeds, in the place of such lunatic, to surrender such lease or leases, and accept and take, in the name and for the benefit of such lunatic, one or more new lease or leases of the premises comprised in such lease or leases surrendered by virtue of the act, for and during such number of lives, or for such term or terms of years absolute, or determinable as therein aforesaid, as was or were mentioned or contained in the lease or leases so surrendered at the making thereof respectively, or otherwise, as the said Lord Chancellor so entrusted should direct :

And (*t*) that every sum of money and other consideration paid by any guardian, trustee, committee, or other person, as a fine, premium, or income, or in the nature of a fine, premium, or income, for the renewal of any such lease, and all reasonable charges incident thereto, should be paid out of the estate or effects of the infant or lunatic for whose benefit the lease should be renewed, or should be a charge upon the leasehold premises, together with interest for the same, as the said courts and Lord Chancellor so entrusted respectively should direct and determine; and that, as to leases to be made upon surrenders by *femes covert*, unless the fine or consideration of such lease and the reasonable charges should be otherwise paid or secured, the same together with interest should be a charge upon such leasehold premises for the benefit of the person who should advance the same :

And further (*u*), that every lease to be renewed as aforesaid should operate and be to the same uses, and be liable to the same trusts, charges, incumbrances, dispositions, devises, and conditions, as the lease to be from time to time surrendered was or would have been subject to in case such surrender had not been made.

The powers given by the act to the court of Chancery and the Lord Chancellor may be exercised by other judicial dignitaries, as we have already had occasion to notice (*x*).

(*t*) Sect. 14.

(*u*) Sect. 15.

(*x*) See ante, p. 739, sections of the act 36 *et seq.*

If a lease be vested in a trustee for the lunatic, the court will order a renewal to be taken in the trustee's name, without changing the estate; but if the lease be in the lunatic himself, and only taken out of him by the act of the court, the new lease ought to be made to the lunatic himself, and not to his committee (*y*).

Renewals are compellable by persons having fiduciary, qualified, or partial interests in the premises, as trustees, executors, mortgagees, tenants for life, &c. (*z*).

It is to be observed, that trustees have not an arbitrary and capricious power with respect to the renewal of leases. They are bound to renew, provided the renewal will be beneficial to the cestuis que trust (*a*). Such an arbitrary and capricious power may be given (*b*); but it is not conferred by a settlement requiring them to renew "as occasion may require, and as they may think proper"; by which is to be understood, as they may think proper for the interests of their cestuis que trust. The exercise of a power of renewal does, indeed, require a discretion, for otherwise a trustee would be bound to comply with any unreasonable demands on the part of the lessor; but not an arbitrary and capricious discretion (*c*).

Executors, and guardians, for this purpose, are considered as trustees.

VIII.—*As to the relief given in equity against the tenant's laches in applying for a renewal.*

The same strict compliance with the conditions on which a renewal is to be obtained at law, is not requisite in equity; the object of the latter branch of the judicature being a sub-

(*y*) *Ex parte Jermyn*, 3 Swanst. 131, n. (*a*). The 13th sect. of 11 Geo. 4 & 1 W. 4. c. 65, contains nearly the same words as 29 Geo. 2. c. 31, the act in force when this decision was made.

(*z*) See further on this subject, post, p. 762.

(*a*) *Lord Milsington v. Lord Mul-*

grave, 3 Madd. 491; S. C., nom. *Lord Milsington v. Lord Portmore*, 5 Madd. 471. *Lord Montford v. Lord Cadogan*, 17 Ves. 485; S. C., on appeal, 19 Ves. 635; 2 Meriv. 3. *Colegrave v. Manby*, 6 Madd. 72; S. C. 2 Russ. 238.

(*b*) See an example in *Milles v. Milles*, 6 Ves. 761.

(*c*) See cases cited in note (*a*) sup.

stantial performance of the contract, as far as circumstances will permit. And, therefore, where the plaintiff can show that he has done everything in his power, but, by unavoidable accident, by fraud, surprise, or ignorance, not wilful, has been prevented from executing his covenant literally, the court, on his making compensation, will interpose in his favor (*d*).

The case of *Rawstorne v. Bentley* (*e*) affords an example. Certain premises held of the manor of Highbury, in which manor no lease could be granted of copyhold lands holden thereof for more than twenty-one years, were there demised for twenty-one years, at a rent of 1*l.* per annum; and the lessor covenanted, before the end of the term to renew for a term of twenty-one years, and to renew from the end of such term, for twenty-one, twenty-one, and fifteen years more, making in the whole a term of ninety-nine years, at the said rent of 1*l.* The plaintiff entered, and expended upwards of 700*l.* in building on the premises; but, at the expiration of the first term of twenty-one years, in 1775, an arrear of rent being due, and no application being made for a renewal, possession of the premises was obtained by the lessor's executor under an ejectment. The plaintiff first demanded a renewal in 1788, and some time afterwards filed his bill, accounting for the previous delay by showing that he had been abroad under difficulties, and that a commission issued against him in 1781, which was afterwards superseded in 1787. The court considered that the lease was originally intended to be for ninety-nine years, but that the custom of the manor was an obstacle

(*d*) *Eaton v. Lyon*, 3 Ves. 692. *Rawstorne v. Bentley*, 4 Bro. C. C. 415. *Kane v. Hamilton*, 1 Ridgew. P. C. 180-6. *Bateman v. Murray*, 1 Ridgew. P. C. 187, and n. p. 201; S. C. Bro. P. C. Toml. Ed. vol. 5, p. 20. *Sweet v. Anderson*, 2 Bro. P. C. 430; S. C. Toml. Ed. vol. 2, p. 257. *Earl of Ross v. Worsopp*, 4 Bro. P. C. 411; S. C. Toml. Ed. vol. 1, p. 281. *Charles v. Rowley*, 6 Bro. P. C. 73; S. C. Toml. Ed. vol. 2, p. 485. *Magrath v. Lord Muskerry*, 1 Ridgew. P. C. 469;

S. C. 1 Vern. & Seriv. 166. *Mac Alpine v. Swift*, 1 Ball & Beat. 285. *Firman v. Lord Ormonde*, 1 Beat. 347. 351. Lord Erskine considered this rule as too limited; *Sanders v. Pope*, 12 Ves. 282. And see the remarks of L. C. B. Richards in *Maxwell v. Ward*, 11 Price, 16-17; and *Statham v. The Trustees of the Liverpool Docks*, 3 Yo. & Jerv. 565.

(*e*) *Rawstorne v. Bentley*, 4 Bro. C. C. 415.

to the grant of a term of that duration; and, under all the circumstances, the plaintiff was deemed to be a proper subject for equitable relief.

This species of equity was formerly carried to a length that became in some degree alarming. The court got into the habit of construing terms and conditions of covenants as being only *in terrorem*; but in modern times that practice has been much restrained; and it is now settled, that a party cannot avail himself of equitable circumstances, unless he can show that there has been no fraud, wilful neglect, or misconduct, on his own part (*f*); and that the case is one which admits of compensation (*g*).

Accordingly, where a lessor covenanted for renewal on the request of the lessee within three months before the expiration of the then granted lease, and the lessee, being still in possession, neglected to apply for a renewal till within a month of its expiration, and the defendant in the meantime had agreed to demise the premises to other persons, Lord Hardwicke was clearly of opinion that the omission to apply at the time agreed on was a bar to relief; observing, that if a lessee were relievable in such a case, he knew not where the court could stop; it would be saying that the lessee should be loose, and the lessor bound (*h*). "It may be observed," adds Mr. Fonblanque, "that the case referred to was a lease of a colliery, which, from the nature of the property, might have influenced the judgment of the court; and the Chancellor certainly does appear in the note which I have of the case to have adverted to such circumstance (*i*); but his lordship seems to have rested his decision upon general principles, and not upon the particular circumstances of the case."

(*f*) *Eaton v. Lyon*, 3 Ves. 693. *Pendred v. Griffith*, 4 Bro. P. C. 512; S. C. Toml. Ed. vol. 1, p. 214. *Davis v. Oliver*, 1 Ridgew. P. C. 1. *Magrath v. Lord Muskerry*, 1 Ridgew. P. C. 469; S. C. 1 Vern. & Scriv. 166. *Walker v. Jeffreys*, 1 Hare, 341.

(*g*) *Ibid.* *Mac Alpine v. Swift*, 1

Ball & Beat, 265. *Firman v. Lord Ormonde*, 1 Beat. 347. *Kane v. Hamilton*, 1 Ridgew. P. C. 180-6.

(*h*) *Allen v. Hilton*, 1 Fonbl. Tr. Eq. 432, n. 5th edit.; cited in *The City of London v. Mitford*, 14 Ves. 50-58.

(*i*) See also 14 Ves. 58.

The case of *The City of London v. Mitford* (*k*), being also a demise for years, with a covenant for renewal at the plaintiff's request within one month before the end of the term, establishes the same doctrine.

So, where a lease was granted for ninety-nine years, if three persons or either of them should so long live, with a covenant on the lessor's part to renew, at the lessee's request, on the dropping of the first life; the lessee's neglect to apply for renewal till the decease of the third life was held to extinguish his right to a renewal in equity, as well as at law (*l*).

So, where a lease was granted for lives absolutely, and the tenant having the option of renewing at the decease of the first of three lives on which the lease was held, omitted to apply for the purpose until after the death of a second life, the court refused its assistance (*m*).

Another example is afforded by *Eaton v. Lyon* (*n*), a case expressly determined on the same principle as that last quoted. George Hockenhull demised certain premises to Daniel and Stanley Orred for the lives of three persons, and the life of the survivor, at a yearly rent of 10*l.*; and the lessees covenanted that they would within six months next after the decease of any of the said three persons give notice to the lessor of the decease of such person or persons, and would, within the further space of six months, surrender that demise, and accept of a new lease of the premises, and therein add one or two life or lives to the life or lives then in being, as the case should require; paying for the same, if but one life to be added, the sum of 5*l.*; if two, 10*l.* And the lessor covenanted that he would, at the decease of any of the life or lives aforesaid, at the request of the lessees, or of the survivor, &c., grant a new lease of the premises, and add one or more

(*k*) *The City of London v. Mitford*, 14 Ves. 41.

(*l*) *Baynham v. Guy's Hospital*, 3 Ves. 295. And see *Rubery v. Jervoise*, 1 Term Rep. 229.

(*m*) *Bayley v. The Corporation of Leominster*, 1 Ves. jun. 476; S. C. 3

Bro. C. C. 529. *Harries v. Bryant*, 4 Russ. 89.

(*n*) *Eaton v. Lyon*, 3 Ves. 690. But see this case distinguished from *Bayley v. The Corporation of Leominster*, in *Maxwell v. Ward*, 13 Pri. 679; 1 McClell. 465.

life or lives in the room of the life or lives so dying. In 1782, one of the cestuis que vie died; and in December, 1782, being within six months after such death, one Jackson, by the direction of Helen Orred, the party then entitled to the lease, went to the house of Daniel Daulby for the purpose of giving notice of such death to John Hockenhull, then being the reversioner, residing in Daulby's house, and to apply for a fresh life to be added to the lease. Jackson did not see Hockenhull, being informed that he was very ill in bed, and could not speak so as to be understood; nor did he desire Daulby to inform him of his (Jackson's) business. Hockenhull died on the 20th December, 1782. Helen Orred died in 1787, without adopting any further steps for procuring a renewal. Under these circumstances, the Master of the Rolls, considering that, according to the fair construction of the covenant, notice should have been given on the expiration of the first life; and that as Helen Orred had neglected to give such notice within a reasonable time after Hockenhull's death, she had forfeited her right of renewal. The communication with Daulby was held to be insufficient for the purpose; for, though Hockenhull was too ill to be seen, there was no reason why he should not have left the notice; or given it to the person who was entitled upon his death.

A more recent case (*o*), founded on the decision in *Eaton v. Lyon*, remains to be noticed. The defendant in 1792 demised the premises in question to E. M. Brown for ninety-nine years, if he (the lessee), E. Candler, and E. P. Maxwell, or any of them, should so long live, subject to a covenant, that if the said E. M. Brown, his executors, &c., should at any time or times thereafter upon the death of any or either of the said life or lives be desirous to renew, by adding a new life or lives in the room of the person or persons so dying, and of such desire should give notice in writing to the defendant, his heirs, &c., within one year next after the death of any or either of the said person or persons for whose life or

(*o*) *Maxwell v. Ward* 11 Pri. 3; S. C. 13 Pri. 674; 1 M'Clel. 458.

lives the said premises were then held, then the defendant, his heirs, &c., would at the costs of E. M. Brown, his executors, &c., at any time within the space of one year next after the death of such life or lives, execute to the said E. M. Brown, his executors, &c., a new lease of the premises for a new term of ninety-nine years, to be determinable on the death or deaths of such said life or lives thereinbefore mentioned, as should be then in being, and the life or lives of such other person or persons as the said E. M. Brown, or his executors, &c., should nominate, in the room of the life or lives so dying, under the like rents and covenants, &c., and so *toties quoties* as any life or lives should die. The lessee, the first life, died in 1803; but no renewal being called for until 1808, the defendant then refused an application for that purpose. The second of the lives dropped in August, 1817; and the third, in February, 1818, both within a twelvemonth; and on the 6th of April, 1818, a formal notice of an intention to renew was delivered by the plaintiffs to the defendant. The first question was, whether, as a proper application had not been made on the dropping of the first life, but as such application had been duly made on the falling of the second, the plaintiffs were entitled to a renewal for two new lives; that is, whether the demand made within the year after the death of the second life, gave them a right to substitute another life in lieu of the first. On this point the court gave a decided opinion, founded on the principle of the construction of a covenant being the same in equity as at law, that the requisition made after the expiration of the second life did not entitle the plaintiffs to a renewal for the first. The next question, whether the parties, having complied with the conditions of the covenant on the determination of the second life, and of the third also, were in a situation to insist on a renewal of the second and third lives, notwithstanding their omission on the dropping of the first, was considered to have been already determined by the case of *Eaton v. Lyon*. The Lord Chief Baron (Alexander) declared himself unable to discover any broad, clear, intelligible ground upon which

he could distinguish the point determined in it from the present; and, after comparing the particular words and expressions in the two cases, said, that he should feel himself bound to dismiss the bill; but regarding the question as one of very great nicety and difficulty, he gave the plaintiffs the advantage of retaining the bill for twelve months, to enable them to take the opinion of a court of law, by bringing an action for the breach of covenant, or by adopting any other course, other than an action of ejectment, as they might be advised. If no action were brought within that period, the bill was to stand dismissed, but without costs.

In the case of *McAlpine v. Swift* (*p*), where a lessee for a specified number of years, ending in November, with the benefit of a covenant for renewal at the expiration of the term, for three lives, provided he nominated the lives within the last six months of the term, omitted to do so till the January following, the court refused to relieve him; and adverted to the impossibility of calculating the amount of injury the lessor might have sustained by the lives not being named within the time agreed on, as the lives named in November might have expired by January.

But in a later case in Ireland (*q*), somewhat similar in its circumstances, where the same difficulty of making compensation was urged in argument against the plaintiff's right to a renewal, Hart, C., declared that he saw no difficulty; for the duration of human life with its casualties was the sub-

(*p*) *McAlpine v. Swift*, 1 Ball & Beat. 285. And see *Kane v. Hamilton*, 1 Ridgew. P. C. 180-6.

(*q*) *Firnan v. Lord Ormonde*, 1 Beat. 347. And see *Sweet v. Anderson*, 2 Bro. P. C. 430; S. C. Toml. Ed. vol. 2, p. 256. In Ireland it has long been the practice in case of the tenant's neglect to renew, to calculate the value of a life at seven years' purchase, and to compensate the lessor by the assessment of septennial fines, with interest for the delay. *Bateman v. Murray*, 1 Ridgew. P. C. 187. 196-7.

Harrison v. Prendergast, cited, 1 Ridgew. P. C. 191; S. C. Wallis, by Lyne, 188, n. *Kane v. Hamilton*, 1 Ridgew. P. C. 180-3-5. *Boyle v. Lysaght*, 1 Ridgew. P. C. 384. 404; S. C. 1 Vern. & Scriv. 135. *O'Neil v. Jones*, 1 Ridgew. P. C. 170-4. *Sweet v. Anderson*, 2 Bro. P. C. 430; S. C. Toml. Ed. vol. 2, p. 256. *Keating v. Sparrow*, 1 Ball & Beat. 367. 373. *O'Hara v. Bourke*, Wallis, by Lyne, 191, n. *Shore v. Lord Darnley*, Wallis, by Lyne, 192, n.

ject of daily calculation, acted on in every court of justice ; and that, by applying those calculations to the subject in question, the result would ascertain the compensation. In this case the tenant, having been misled by the lessor's steward, was relieved against an omission to nominate a life in due time.

Where a party contracted to grant another a lease for lives renewable for ever, and gave him possession accordingly, and the tenant agreed to lay out a certain sum on the premises within three years, but died within that period, leaving an infant heir, who did not attain his majority till nineteen years afterwards, and no one came forward in the interval on behalf of the infant either to take the lease, or to defray the necessary expenditure, it was held that the infant could not take advantage of his infancy, to excuse the non-assertion of his right under the agreement, the immediate assertion of his right, and performance of his part of the contract, being essential to the interest of the other party ; and that if the contract were to continue executory during the whole minority, it would not be giving the landlord the benefit of that in consideration of which he stipulated to grant the lease (*r*).

Gross laches in applying for a renewal will not be relieved against in equity, although the property be brought into settlement (*s*).

If a lessee for lives, with a covenant for perpetual renewal, underlet with a covenant for perpetual renewal on the dropping of lives, provided the lives named by the underlessee be the same as those from time to time named by the mesne lessor ; and with a further provision, that his covenant shall be void unless the underlessee, within twelve months after the death of a nominee, nominate a new life, he cannot claim a forfeiture of the underlessee's right of renewal on the ground of laches, if he himself, by omitting to obtain a renewal from the head landlord, has never been in a position to call upon the underlessee to take a renewal (*t*). And on renewal of the head

(*r*) *Griffin v. Griffin*, 1 Scho. & Lef. 393 ; S. C. 4 Dru. & War. 240.
352.

(*t*) *Fitzgerald v. O'Connell*, 1 Jo. &

(*s*) *Townley v. Bond*, 2 Con. & Law. La Tou. 135.

lease in such a case, it is the duty of the lessee to give notice of it to the underlessee before he can proceed against him by ejectment for a forfeiture consequent on neglect to call for a renewal (*u*).

An omission to give notice *in writing*, though the covenant prescribe that mode, will not entail on the lessee the penalties of laches, if it can be shewn that a fair intimation of an intention to renew has been given in any other way (*x*).

If, in an underlease of renewable leaseholds, the underlessee's right of renewal be made forfeitable on non-payment to his lessor, within three months after he shall have obtained a renewal, and after notice thereof shall have been given to the underlessee, of a proportionable part of the fine, costs, and expenses; to disentitle the underlessee to a renewal, the service of the notice must be clearly proved, so as to satisfy the mind of the court that the intention of the lessor to insist on the forfeiture, and the information as to the facts which were peculiarly within his knowledge, were fully brought home to the tenant. The court cannot establish a forfeiture on suspicions (*y*).

Ignorance is considered wilful, where a person neglects the means of information which ordinary prudence would suggest (*z*); and it is clear that ignorance of a man's own rights, conferred by an instrument actually in his possession or power, where the other party is consequently innocent of concealment, or of any conduct contributing to keep him ignorant of its contents, cannot excuse the performance of any conditions imposed on the person claiming under the instrument (*a*).

And accident is not unavoidable which reasonable diligence might have prevented. In illustration of these two principles may be cited the late case of *Harries v. Bryant* (*b*). The plaintiff, having taken an assignment of a lease for three

(*u*) *Wallace v. Patten*, 1 Irish Eq. Rep. 333.

(*x*) *Maxwell v. Ward*, 11 Pri. 16.

(*y*) *Lawless v. Grogan*, 1 Dru. & Wal. 53. And see *John v. Armstrong*,

Lloyd & Goo. 392, temp. Plunk.

(*z*) *Harries v. Bryant*, 4 Russ. 69.

(*a*) *Maxwell v. Ward*, 11 Pri. 3; S. C. 13 Pri. 674-6; 1 McClel. 458.

(*b*) *Harries v. Bryant*, 4 Russ. 89.

lives, which contained a covenant for renewal on the falling of each life, provided application were made for renewal within six months after the life dropped, allowed almost ten months to elapse between the death of the first cestui que vie and his application for renewal; and excused his delay by alleging that he neither knew that the deceased person was the life named in the lease, nor that he was dead, until after the expiration of the six months; but the court dismissed his bill with costs; as ordinary prudence would have suggested, and reasonable diligence would have required, that he should ascertain who the lives were, and take measures to secure early information of their deaths. All this he appeared to have neglected; his ignorance, therefore, was wilful, and the accident not unavoidable.

If the reversion, subject to a lease with a covenant for perpetual renewal, become vested in two individuals in different rights, and the lessee, after a refusal by them to renew, and a bill filed by him, but not pursued, accept from one of them a fresh lease of a moiety of the premises, with the same stipulations and covenant for perpetual renewal as were contained in the demise of the entirety, it may perhaps be doubtful whether the acceptance of the new lease does not amount to an abandonment of the right of renewal as to the other moiety. Lord Eldon said, that he did not know that upon that circumstance alone the court would refuse execution of the covenant [*i.e.*, as to the other moiety under the original covenant for renewal]; but that it was a strong circumstance; for the interest under that lease was very different from a lease of the whole at a single rent, from a person representing the whole estate; especially as there was *pro tanto* a dereliction of the right to a lease of the whole; and the demand that was made by suit was not pursued (*c*).

As a general rule, the costs of obtaining relief must fall on the plaintiff (*d*).

(*c*) *The City of London v. Mitford*,
14 Ves. 41. 57.

(*d*) *Firman v. Lord Ormonde*, 1
Beat. 347. 352. Dean, or Freeman,

v. The Marquis of Waterford, 1 Scho.
& Lef. 451, n. *Barrett v. Pearson*, 2
Ball & Beat. 189.

The greater latitude said to have been allowed in Ireland in cases of laches, founded on what has been termed, a *local equity*, or *the old equity of the kingdom* (*e*), received a check in the English House of Lords when the cases of *Kane v. Hamilton* (*f*), and *Bateman v. Murray* (*g*), came before them in their appellate capacity. The alarm created by the decision of *Bateman v. Murray* occasioned the statute 19 & 20 Geo. 3. c. 30, commonly called the Irish Tenantry Act, by which, after reciting that great parts of the lands in Ireland were held under leases for lives with covenants for perpetual renewals upon payment of certain fines at the times therein specified, and that from accidents such tenants frequently neglected to pay or tender such fines within the times prescribed, it was provided, that courts of equity, upon adequate compensation being made, should relieve such tenants against such lapse of time, if no circumstances of fraud should be proved against them, unless it should be proved to the satisfaction of such courts that the landlord had demanded such fines, and that the same had been refused or neglected to be paid within a reasonable time after such demand; thus reviving the *old equity* referred to. The cases of *Boyle v. Lysaght* (*h*), and *Magrane v. Archbold* (*i*), contain a succinct history of renewable leases in Ireland, and of the principles on which renewals have been decreed. For the construction of the Tenantry Act, which is not within the scope of these pages, the reader may refer to the cases collected in the note (*k*).

(*e*) See *Sweet v. Anderson*, 2 Bro. P. C. 430; S. C. Toml. Ed. vol. 2, p. 256. *Earl of Ross v. Worsopp*, 4 Bro. P. C. 411; S. C. Toml. Ed. vol. 1, p. 231. *O'Neil v. Jones*, 1 Ridgew. P. C. 170. *Boyle v. Lysaght*, 1 Ridgew. P. C. 384. 405; S. C. 1 Vern. & Scriv. 135.

(*f*) *Kane v. Hamilton*, Wallis, by Lyne, 172; S. C. 1 Ridgew. P. C. 180.

(*g*) *Murray v. Bateman*, Wallis, by Lyne, 181. *Bateman v. Murray*, 1 Ridgew. P. C. 187.

(*h*) *Boyle v. Lysaght*, sup.

(*i*) *Magrane v. Archbold*, 1 Dow, P. C. 107. 109. See also *Magrath v. Muskerry*, 1 Ridgew. P. C. 469; S. C. 1 Vern. & Scriv. 166.

(*k*) *Boyle v. Lysaght*, sup. Deane, or Freeman, v. The Marquis of Waterford, cited, 1 Scho. & Lef. 451, n. *Jackson v. Saunders*, 1 Scho. & Lef. 443. *Keating v. Sparrow*, 1 Ball & Beat. 367. *Jessop v. King*, 2 Ball & Beat. 81. *Wallace v. Patten*, 1 Irish Eq. Rep. 338. *Trant v. Dwyer*, 1 Dow & Cla.

Of course, the lessor may waive his right to a forfeiture by *laches* of the tenant's right to renew; and such waiver may be absolute, or conditional, as on immediate payment of arrears of rent and the renewal fines: and, in the latter case, the tenant's failure to comply with the terms will close his right to equitable relief (*l*).

SECTION III.—AS TO TRUSTS BEING GRAFTS ON RENEWED TERM.

A most important and salutary branch of the jurisdiction of equity is called into operation to prevent trustees of, and parties having limited or qualified interests in, a renewable leasehold, from deriving an unfair advantage from their peculiar character or situation.

No point of law can be better established than that a trustee renewing a lease taken by him in that capacity shall hold the renewal for the benefit of the *cestuis que trust* (*m*). And where a testator devised certain leasehold premises to his daughter for life, for her sole and separate use, with remainders over, without appointing trustees, and the daughter's husband, representing himself to be entitled to the privilege

125. *Vesey v. Bodkin*, 1 Dow & Cla. 456. *John v. Armstrong*, Lloyd & Goo. 392, temp. Plunk. *Baldwin v. Bridges*, Lloyd & Goo. 408, temp. Plunk. *Butler v. Lord Portarlington*, 1 Con. & Law. 1; S. C. 4 Ir. Eq. Rep. 1. *O'Reilly v. Featherston*, 2 Dow & Cla. 39. See likewise 1 & 2 Viet. c. 62.

(*l*) *Townley v. Bond*, 2 Con. & Law. 393; S. C. 4 Dru. & War. 240.

(*m*) *Holt v. Holt*, 1 Ch. Ca. 190. Anon. 6 Mod. 57, case 68. *Darrell v. Whitehot*, 2 Rep. in Ch. 59. *Edwards v. Lewis*, 3 Atk. 538. *Rawe v. Chichester*, 2 Ambl. 715. 719; S. C. 1 Bro. C. C. by Belt, 198, n.; S. C., nom. *Bromfield v. Chichester*, Raw v. Du-

thelly, 2 Dick. 480. *Griffin v. Griffin*, 1 Scho. & Lef. 352. *Fitz-gibbon v. Scanlan*, 1 Dow, P. C. 261. *Pickering v. Vowles*, 1 Bro. C. C. 197-8. *Nightingale v. Lawson*, 1 Bro. C. C. 440. *Ex parte Phelps*, 9 Mod. 357. *Stone v. Theed*, 2 Bro. C. C. 247-8. *Killiek v. Flexney*, 4 Bro. C. C. 161. *Lord v. Holmes*, cited, Ambl. 719. *Keech v. Sandford*, (sometimes called the *Rumford Market Case*), Sel. Ca. in Ch. 61; S. C. 2 Eq. Ca. Ab. 741. pl. 7. And see *Verney v. Verney*, 1 Ves. 428-9; S. C. Ambl. 88. *Pierson v. Shore*, 1 Atk. 480. *Nesbitt v. Tredennick*, 1 Ball & Beat. 29. 46. *Mausell v. O'Brien*, Jones, Ir. Exch. 176.

of renewal under the will of the former tenant, obtained a grant of a reversionary term, his representatives were decreed to hold it for the benefit of the persons entitled under the will (*n*).

To such a length has this doctrine been carried, that where a trustee procured a new lease, it being perfectly clear that the lessor would never have renewed for the benefit of the cestui que trust, the rule was still adhered to (*o*).

In a late case before the House of Lords (*p*), it appeared that certain premises, in settlement, were publicly advertised to be let, the former lease having expired; and that the trustee obtained a lease to himself, having expressly disclaimed, when he made proposals, all intention of taking in the character of trustee; but notwithstanding this precaution, and subsequent unimpeached possession for about eighteen years, he was held to have renewed for the cestui que trust, and his representative was ordered to account accordingly.

But if a trustee obtain a renewal of a lease, the subject of his trust, and additional lands be demised to him by the same instrument, at an entire rent; the cestui que trust will be entitled to the benefit of the renewal only to the extent of the original lands (*q*).

So, if executors renew in their own names, for their own benefit, they shall hold the renewed lease, as part of the testamentary estate (*r*). And the same rule was extended to a case where a stranger wrongfully interfered in the affairs of a deceased testator, and procured a renewal in his own favor,

(*n*) *Parker v. Brooke*, 9 Ves. 533.

(*o*) *Keech v. Sandford*, or *The Rumford Market case*, Sel. Ca. in Ch. 61; S. C. 2 Eq. Ca. Ab. 741. pl. 7. *Fitzgibbon v. Scanlan*, 1 Dow, P. C. 269. *Ex parte Andrews*—*Re Emmett*, 1 Madd. 575-6. *Ex parte James*, 8 Ves. 337. 345.

(*p*) *Fitzgibbon v. Scanlan*, 1 Dow, P. C. 264.

(*q*) *Acheson v. Fair*, 2 Con. & Law. 208; S. C. 3 Dru. & War. 512.

(*r*) *Holt v. Holt*, 1 Ch. Ca. 190. *Anon*, 2 Ch. Ca. 207. *Rawe v. Chichester*, Ambl. 715; S. C. 1 Bro. C. C. by Belt, 198, n.; S. C., nom. *Bromfield v. Chichester*, or *Raw v. Duthelly*, 2 Dick. 430. *Luckin v. Rushworth*, Rep. temp. Finch, 392; S. C. 2 Rep. in Ch. 113, 2nd edit. *Pickering v. Vowles*, 1 Bro. C. C. 197-8. *Abney v. Miller*, 2 Atk. 597. *Moody v. Matthews*, 7 Ves. 174. *James v. Dean*, 11 Ves. 383.

having coerced the actual executor to surrender a subsisting lease, part of the testator's estate (*s*).

If a mortgagee obtain a renewal, the new lease will be subject to the trusts and limitations of the former one (*t*), notwithstanding the term comprised in the mortgage be expired before the renewal be obtained (*u*).

So, on the other hand, if a lessee mortgage, and renew, the new lease will be a graft on the old one for the mortgagee's benefit (*x*).

On the same principle, if one partner privately obtain in his own name, and for his own individual benefit, a lease of the premises where the joint trade is carried on, the renewed term will be held in trust for the partnership (*y*).

In like manner, if one interested in a lease jointly with another, though not in partnership, renew in his own name, he is a trustee, by implication for the benefit of the other to the extent of his share (*z*). If the other be an infant, and the renewed lease prove advantageous, he is entitled to his share of the advantage; but if not beneficial, the trustee must sustain the loss. This is the peculiar privilege of the unprotected condition of an infant. The infant, however, claiming

(*s*) *Mulvany v. Dillon*, 1 Ball & Beat. 409. *Griffin v. Griffin*, 1 Scho. & Lef. 352.

(*t*) *Darrell v. Whitehot*, 2 Rep. in Ch. 59. *Rawe v. Chichester*; *Bromfield v. Chichester*; or *Raw v. Duthelly*, sup. *Luckin v. Rushworth*, Rep. temp. Finch, 392; S. C. 2 Rep. in Ch. 113, 2nd edit.

(*u*) *Rakestraw v. Brewer*, 2 P. Wms. 511. And see *Nesbitt v. Tredennick*, 1 Ball & Beat. 29.

(*x*) *Smith v. Chichester*, 1 Con. & Law. 486. All well-prepared mortgages of renewable leaseholds impose an obligation to renew on the mortgagor, and empower the mortgagee to renew, in case of his neglect, and declare that the fine and expenses shall be a charge on the premises, and carry interest. Unless the mortgage contain

such a provision, the mortgagor is not compellable to renew; but if the mortgagee obtain a renewal, which it is competent to him to do, the amount of the fines and expenses will be added to the principal of the mortgage, and carry interest. *Manlove v. Bale*, 2 Vern. 84. *Laeon v. Mertins*, 3 Atk. 4; S. C. nom. *Lucan v. Mertins*, 1 Wils. 34. *Hamilton v. Denny*, 1 Ball & Beat. 199, 202.

(*y*) *Featherstonhaugh v. Fenwick*, 17 Ves. 298, 311. *Alder v. Fournere*, 3 Swanst. 439. *Fawcett v. Whitehouse*, 1 Russ. & Myl. 132.

(*z*) *Palmer v. Young*, 1 Vern. 276; S. C. 1 Eq. Ca. Ab. 330, (B). pl. 2. *Hamilton v. Denny*, 1 Ball & Beat. 199, 202. Ex parte *Grace*, 1 Bos. & Pul. 376. *Jackson v. Welsh*, Lloyd & Goo. 346, temp. Plunk.

the benefit of the renewal, must contribute his proportion of the expenses (*a*).

If a stranger to the estate, by *suppressio veri*, or *suggestio falsi*, obtain a grant of a reversionary term, to the prejudice of the old tenant, it should seem that he will be converted into a trustee (*b*).

But it may be inferred from the case last cited (*c*), that there is no equity in favor of the owner of a leasehold held under repeated renewals, against a stranger who procures a grant of a reversionary term, to commence on the determination of the subsisting lease, without giving notice to the lessee of his application to the lessor. Nor is there any equity against a stranger who procures a fresh term after the expiration of the former one usually renewed (*d*).

And it has been determined in a late case in the Irish Exchequer (*e*) that if an under-lessee obtain a renewal from the head landlord, without consulting his own immediate landlord, he is not converted into a trustee of such renewed lease for such immediate landlord, although the latter may have a tenant-right of renewal. And further, that payment of rent by the underlessee to the head landlord, with the privity of the mesne landlord, will not constitute the under-lessee his agent in the sense in which that word is used in cases on this subject.

By an early case (*f*), the report of which is so obscure as to render an acquaintance with the facts extremely difficult, it appears, that the plaintiff had a trust in a lease by patent from King Charles the 1st, which was afterwards renewed by King Charles the 2nd, and other trustees were named therein. The defendant, being one of the trustees, insisted that he was

(*a*) Ex parte Grace, sup.

(*b*) Parker v. Brooke, 9 Ves. 383.
But see Lee v. Lord Vernon, 7 Bro. P. C. 432; S. C. Toml. Ed. vol. 5, p. 10.

(*c*) Lee v. Lord Vernon, sup.

(*d*) Earl of Sandwich v. Earl of Litchfield, Colles, P. C. 104. Stokes v. Clarke, Colles, P. C. 192. Nesbitt

v. Tredennick, 1 Ball & Beat. 29. Lesley's case, Freem. Ch. 52.

(*e*) Maunsell v. O'Brien, Jones, 176.

(*f*) Darrell v. Whitchoy, 2 Rep. in Ch. 59. The obscurity of the report has rendered it necessary to transcribe it nearly verbatim.

a joint-patentee for the valuable consideration of 500*l.*; but the plaintiff insisted that the defendant came in as his trustee, and not (*g*) to be subject to the same trust in the new lease as he was under the old. But the defendant insisted that the new patent was to the new trustees for services done by them to Charles the 2nd, and his own 500*l.*; yet the plaintiff urged that there was a continued trust, and that the defendant and the King declared he (*h*) had a respect for the old tenants, and that as the defendant came in under the tenant's interests, he ought to be in trust for the plaintiff; and though there was no tenant-right against the King, yet that the King did consider the tenants, and that the case was the same as that of a mortgagee or trustee renewing a church lease, in which case the court had given relief; but the court of Chancery with the judges declared their opinion that there was no ground to relieve the plaintiff, and so dismissed his bill.

If a tenant for life of a leasehold estate under a will or settlement obtain a renewal for his own benefit in his own name, or in the name of a trustee, the new lease will be subject to the other provisions of the will or settlement relating to that property (*i*); and though, in the case of settlement, the tenant for life be himself the author of it (*k*).

And the same rule prevails though the settlement contain an express provision that a particular renewal obtained by the tenant for life in the name of a child in lieu of one of

(*g*) Thus in the report; but the sense seems to require the rejection of the word *not*.

(*h*) So in the report.

(*i*) *Taster v. Marriott*, Ambl. 668. *Ketch v. Sandford*, (known also as the *Rumford Market case*), Sel. Ca. in Ch. 61; S. C. 2 Eq. Ca. Ab. 741. pl. 7; cited, Ambl. 719; 3 Meriv. 196. Anon. 6 Mod. 57, case 68. *Edwards v. Lewis*, 3 Atk. 538. *Rawe v. Chichester*, Ambl. 715; S. C. 1 Bro. C. C. by Belt, 193, n.; S. C., nom. *Bromfield v. Chichester*, or *Raw v. Duthelly*, 2 Dick. 480. *Owen v. Williams*, Ambl.

734. *Eyre v. Dolphin*, 2 Ball & Beat. 290. *Bowles v. Stewart*, 1 Scho. & Lef. 209. *James v. Dean*, 11 Ves. 383; S. C. 15 Ves. 236. *Brookman v. Hales*, 2 Ves. & B. 45. *Hardman v. Johnson*, 3 Meriv. 347. *Randall v. Russell*, 3 Meriv. 190. *Giddings v. Giddings*, 3 Russ. 241. *Waters v. Bailey*, 2 Yo. & Col. V. C. 219. *Buckley v. Lanauze, Lloyd & Goo.* 327, temp. Plunk.

(*k*) *Pickering v. Vowles*, 1 Bro. C. C. 197. *Colegrave v. Manby*, 6 Madd. 72, 85-6; S. C. 2 Russ. 238.

the existing cestuis que vie shall be held upon the trusts of the settlement (*l*).

A husband renewing, or taking a grant of a reversionary term, in right of his wife, tenant for life, is subject to the same equity (*m*).

So, on the other hand, if a legatee of a reversionary interest in leaseholds, with the privity of tenant for life, renew the lease in his own name, he will be deemed a trustee during the life of such tenant for life; and if he covenant to repair the premises, such covenant will be considered to have been entered into on the behalf of the tenant for life, as well as his own, and he will be entitled to be indemnified out of the assets of the tenant for life for dilapidation occasioned by the neglect of the latter to repair (*n*).

And where a testator charged an annuity, given by his will, on "his leasehold interest during his interest in the said leasehold, each and every year during the term of the said lease," the annuity was held to be a charge on a renewal of the term obtained by the devisee for life (*o*).

The quantity of the interest vested in the testator under the lease at the time of his decease cannot alter the nature of the equity arising upon the tenant for life's renewal; for though it be but a year, or a quarter or less portion of a year; nay, though the original term may have expired in the testator's lifetime, if he still continue to hold as tenant from year to year, the renewed term will follow the limitations of the old term (*p*); but the equity does not extend to cases in which the testator was merely tenant at sufferance, or at will (*q*), such tenancies determining by the death of either landlord or tenant (*r*).

The circumstance of the tenant for life surviving the settled

(*l*) *Tanner v. Elworthy*; *Elworthy v. Tanner*, 4 Beav. 487.

(*m*) *Parker v. Brooke*, 9 Ves. 533. See also *Stokes v. Clarke*, Colles, P. C. 192.

(*n*) *Marsh v. Wells*, 2 Sim. & Stu. 87.

(*o*) *Winslow v. Tighe*, 2 Ball & Beat. 195. *Stubbs v. Wroth*, 2 Ball

& Beat. 548. And see *Webb v. Lugar*, 2 Yo. & Col. 247; and *Moody v. Matthews*, 7 Ves. 174.

(*p*) *James v. Dean*, 11 Ves. 383; S. C. 15 Ves. 236.

(*q*) *Ibid*.

(*r*) *Ibid*. *Crockerell v. Owerell*, Holt, 417.

term (*s*), or of the new term being reversionary (*t*), is also immaterial.

The case of *Owen v. Williams* (*u*) furnishes a remarkable instance of the extent to which equity will go to secure the interests of all parties claiming under a devise or settlement of a leasehold. There, the tenant for life under the will of Kyffin Williams made application for a renewal, but, being satisfied that she had no chance of success, in consequence of an opposing application by Lord Grosvenor, accepted from him a sum of 3000*l.* to forego her pretensions; and it was held to be clear that the money must be applied to the same uses as were specified in K. Williams's will: as she could not renew, the court would not suffer her to sell.

But where (*x*) a testator, being seised in fee of a moiety of an estate, and in possession of the other moiety as tenant from year to year to St. John's College, Oxford, the original lease under which he had held the same, at a certain reserved rent, having expired, devised the whole of the estate to his wife for life, with remainders over; and after his death she procured a new lease of the moiety for fourteen years, at a rent of 40*l.*, in consideration of a premium of 400*l.* paid to the college; and afterwards purchased the reversion in fee of that moiety of a Mr. Hull, to whom it had been conveyed in exchange by the college; although it was determined, that the renewed term of fourteen years was subject to the various trusts of the will, yet, as the situation of the parties was altered by the act of the landlord without any intervention of the tenant for life, the college having aliened to a stranger; and as the benefit attending the benefit of the tenant-right of renewal with the college was gone, and no right or interest of the remainder-man had been acquired or defeated by her purchase, and the remainder-man stood wholly unconnected with Hull's reversionary interest, there was no ground for

(*s*) *Rawe v. Chichester*, sup. James
v. Dean, sup.

(*t*) *Taster v. Marriott*, Ambl. 668.
Parker v. Brooke, 9 Ves. 583.

(*u*) *Owen v. Williams*, Ambl. 734;

S. C. 1 Bro. C. C. 199, n. †, 5th edit.
by Belt.

(*x*) *Randall v. Russell*, 3 Meriv.
190. *Hardman v. Johnson*, 3 Meriv.

347.

converting her into a trustee for them. The court, however, intimated, that if the widow had purchased from the college, it might be said that she thereby intercepted and cut off the chance of future renewals, and, consequently, made use of her situation to prejudice the interests of those who stood behind her; and that there might be some sort of equity in their claim to have the reversion considered as a substitution for those interests. But the court was not aware of any decision to that effect.

A testator may, indeed, give a devisee for life a right of renewal for his own individual benefit; but, to confer such an interest, the intention must be very clearly expressed (*y*). In the case cited, the testator gave and devised several leases and premises to his wife, for and during so many years of the terms thereby granted as she should happen to live; and from and immediately after her decease, "if the terms granted in and by the said several leases should be still in being", then he gave the same over; but these words, admitted to be awkward, were held insufficient to give her a separate right of renewal; though in fact she survived the term originally bequeathed by the will (*z*). The words "and all my estate and interest therein" are equally inefficacious, notwithstanding the tenant for life survive the term vested in the testator at his death (*a*).

A quasi tenant in tail of a lease for lives, being considered the absolute owner, is not bound by the same equities as a tenant for life; and, therefore, if he surrender a lease for lives, devised to him and the heirs of his body, and take a new one, he will hold the new lease discharged of the limitations declared by the will in favor of remainder-men, though he afterwards die without issue (*b*); and his devisee is equally exempt (*c*).

A purchaser or mortgagee with notice of the trust stands

(*y*) *Rawe v. Chichester*, sup.

347. *Randall v. Russell*, 3 Meriv. 190.

(*z*) *Ibid.* *Parker v. Brooke*, 9 Ves.
583.

(*b*) *Blake v. Blake*, 1 Cox, 266.

(*c*) *Ibid.*

(*a*) *Hardman v. Johnson*, 3 Meriv.

in the same position as the trustee. Thus, where an executor in trust for an infant residuary legatee surrendered the remaining portion of a lease belonging to his testator, and, without payment of any fine or other consideration, took a new lease in his own name for the same term as was unexpired of the old lease, and, having mortgaged it, assigned the equity of redemption to a trustee to sell for payment of his own debts, and the trustee sold it to a purchaser with notice, the court decreed the sale to be set aside, and the infant entitled to the benefit of the new lease (*d*).

Where a prebendary granted a lease of his prebend to one, who by writing declared a trust of it in favor of the lessor, and the lessor afterwards, on the surrender of this lease, granted a new one to another party, without any declaration of trust, it was held that the second lessee was entitled for his own benefit, and that there was no resulting trust in favor of the lessor, or his representatives (*e*).



SECTION IV.—AS TO THE OBLIGATION OF TENANT FOR LIFE TO RENEW.

In this place we may notice that, unless the nature of the estate (*f*), or a settlement, or will, expressly, or by necessary implication, require a renewal, a tenant for life of the legal estate in leaseholds, where there are limitations over, is not compellable to obtain a renewal for the benefit of remaindermen (*g*); and there is no difference whether the leaseholds be held for years absolutely, or for lives, or for years deter-

(*d*) *Walley v. Walley*, 1 Vern. 484; S. C. 1 Eq. Ca. Ab. 332, pl. 7. *Parker v. Brooke*, 9 Ves. 583. *Buckley v. Lanauze, Lloyd & Goo.* 327, temp. Plunk. *Webb v. Lugar*, 2 Yo. & Col. Exch. 247.

(*e*) *Pilkington v. Bayley*, 7 Bro. P. C. 526; S. C. Toml. Ed. vol. 7, p. 383; S. C. MS. Jour. *sub anno* 1777-8. p. 112.

(*f*) *Nightingale v. Lawson*, 1 Bro. C. C. 443.

(*g*) *Ibid.* *Verney v. Verney*, 1 Ves. 428; S. C. Ambl. 88. *Stone v. Theed*, 2 Bro. C. C. 247-8. *White v. White*, 4 Ves. 24. 33; S. C. 5 Ves. 554; 9 Ves. 554, 557, 561. *James v. Dean*, 15 Ves. 242. *Capel v. Wood*, 4 Russ. 500. *O'Ferrall v. O'Ferrall, Lloyd & Goo.* 79, temp. Plunk.

minable on lives (*h*) ; though the claim of the tenant for life to exemption is particularly strong where the leasehold is held on lives, and he himself is one of the cestuis que vie (*i*). But it is apprehended that the tenant for life would be obliged to surrender his estate, provided he could do so without prejudice to his own interest, in order to enable the remainder-man to obtain a renewal (*k*).

In case the tenant for life takes the equitable, instead of the legal, estate, the point may possibly admit of doubt (*l*).

Where, from the nature of the gift, or the directions of the will or settlement, the lease is to be kept alive, the tenant for life is compellable to do all acts for procuring the necessary renewals (*m*). And in the early case of *Lock v. Lock* (*n*), the court availed itself of slight words indicating such an intention. There, the testator bequeathed a term of twenty-one years, held of a college, to his wife for life, and after her decease to his son James, she paying 10*l.* per annum to James during her life, and not to alien without the son's consent; and it was held, that these terms were an implication that the widow should renew and keep the term on foot; and, there being but seven years of twenty-one to come, she was decreed to renew, and the Master to settle the proportion.

In *Trench v. St. George* (*o*), the testator, after directing his debts to be paid, and charging the payment upon all his property real and personal, gave to certain trustees all his estate, real and personal, upon trust to permit his wife to receive, out of the rents, issues, and profits, of his lands, 100*l.* a year for life, and after payment of his debts, funeral

(*h*) *White v. White*, sup. p. 770.

(*i*) See the cases in note (*g*), p. 770; and also *Graham v. Lord Londonderry*, cited, 2 Bro. C. C. 246; and also 4 Ves. 27, n. (22), 2nd edit.

(*k*) 4 Ves. 28. n. (22), 2nd edit.

(*l*) *Verney v. Verney*, 1 Ves. 428; S. C. Ambl. 88. *Capel v. Wood*, 4 Russ. 500. *White v. White*, sup. It is observable that Ambler, in his report of *Verney v. Verney*, makes no mention of this doubt; but, on the con-

trary, represents Lord Hardwicke to have said, that where the cestui que trust is one of the lives named in the lease, the court would not compel the trustees to surrender that lease, in order for a renewal at the expense of the cestui que trust for life. But see *Reeves v. Creswick*, 3 Yo. & Col. Exch. 715.

(*m*) *White v. White*, 9 Ves. 561.

(*n*) *Lock v. Lock*, 2 Vern. 666.

(*o*) *Trench v. St. George*, 1 Dru. & Wal. 417.

expenses, and legacies, he gave the residue of his real and personal estate to the trustees, in trust for his son Philip (who died in the testator's lifetime) and his heirs for ever, subject to a provision of 8000*l.* for younger children, in case he should have more than one at the time of his decease; and, after making provisions for his children upon contingencies which did not happen, he declared that in case (as the event happened) he should have no other children living at the time of his death except his daughter Melesina, then he gave the residue of his real and personal estate to his trustees, in trust for the sole use of Melesina for life, and after her decease to the use of the first son of her body, and her heirs for ever, subject to such provisions, not exceeding 8000*l.*, as she should by deed or will make for her younger children; and in failure of such issue male of the said son of Melesina, then to the second, third, fourth, &c., with remainder, to the daughters of Melesina; and after giving directions respecting the maintenance and education of his children, he gave the residue of his real and personal estate to the survivor of his children; and it was held, that the first son of Melesina was not bound to contribute to the payment of fines for renewals effected in her lifetime.

But in a recent case (*p*), where certain freeholds and renewable leaseholds were given by will to trustees, to hold to the use of A. for ninety-nine years, with remainder to the use of B. for life, with remainder to his first and other sons in tail male, with remainder to his daughters in tail, with divers remainders over, with a power to tenant for life in possession to charge the estates with jointure, and with a power also to the trustees, at the request of B., to sell the renewable leaseholds, and to lay out the money arising from such sale in the purchase of freehold lands in the county of Longford, to be settled to the same uses, and B. was appointed sole executor, it was held, that there was nothing to show an intention to give to the remainder-man more than the residue unexpired

(*p*) *O'Ferrall v. O'Ferrall*, Lloyd & Coo. 79, temp. Plunk.

at the death of the tenant for life, who might either renew or let the term expire.

So, in *Capel v. Wood* (q), where a testator gave to Mary Wood, for life, certain premises held under the dean and chapter of Westminster, subject to the payment of all *finés* and rents as they became due yearly and for every year, and after her decease to trustees, in trust to manage and do the best for the interests and improvements thereof as their judgment should direct; to receive the rents, and thereout during the time of their trust to pay all fines, rents due, and other demands, until W. C. should attain twenty-one, when the premises were to be assigned to him and his heirs, it was held that the tenant for life was not bound to renew; Lord Gifford declaring that more than an inference should appear on the face of the will to induce the court to impose such an obligation on the tenant for life. And the decision was affirmed by Lord Lyndhurst on appeal.

The court will direct an account to be taken of the renewals, and at whose expense they have been, in order to regulate the proportions to be paid by the tenant for life and remainderman (r). But this part of the subject will be more fully examined hereafter.

If a tenant for life in a settlement of a leasehold estate for lives covenant with the trustees, that, as often as any of the *cestuis que vie* shall die, he will endeavour to renew by purchasing of the lord of the fee new lives or a new life in the room of such lives or life as shall die, his covenant is performed by procuring his own life to be inserted in lieu of that of a deceased *cestui que vie*, although by nominating himself he leave the estate at his death in the same situation as if he had not renewed at all (s).

(q) *Capel v. Wood*, 4 Russ. 500.

(r) *Pickering v. Vowles*, 1 Bro. C. C. 179. *Nightingale v. Lawson*, 1 Bro. C. C. 440.

(s) *Scudamore v. Stratton*, 1 Bos. & Pul. 455. But see *White v. White*, 9 Ves. 554, *in equity*; and post, p. 775.

SECTION V.—AS TO FINES FOR RENEWALS, AND CONTRIBUTION.

Questions frequently arise among persons having different interests in a lease, as to their liability to contribute to the fines and expenses of renewal. We may consider the subject, first, as to parties claiming under the deed or will originally settling the property; and, secondly, as to parties claiming derivatively, as underlessees.

First, as to parties claiming under the deed or will.

The cases relating to contribution between tenant for life and remainder-man appear on the whole to warrant the following conclusions:—

If the will or other instrument do not expressly, or by necessary implication, require a renewal, the tenant for life of the legal estate is neither bound to renew, nor to contribute to the expenses of renewal (*t*); though it is apprehended that he would be compelled to do all necessary acts for enabling the remainder-man to obtain a renewal at his own costs, provided the estate of the tenant for life would receive no prejudice from the transaction (*u*).

If the tenant for life have only an equitable estate, the point may admit of doubt (*x*).

If renewals be directed to be made, and no fund be provided for defraying the fines and expenses, and the estate be held for the lives of strangers to the tenant for life, and neither the tenant for life, nor the remainder-man, can pay for renewal, the court will order the requisite sum to be raised by sale or mortgage of a competent part of the estate itself; and should a mortgage be made, the tenant for life would be bound to keep down the interest of the sum borrowed, and give security for payment also of such part of the capital as may be deemed equivalent to the benefit he may derive under the transaction (*y*).

(*t*) See the cases cited ante, p. 770,
note (*g*).

(*u*) See 4 Ves. 27, n.

(*x*) See ante, p. 771, n. (*l*).

(*y*) *White v. White*, 4 Ves. 24; S. C. 5 Ves. 554; S. C., on appeal, 9 Ves. 24.

Under the same circumstances of renewals being directed, but no fund provided for defraying the fines and expenses, if the tenant for life be one of the *cestuis que vie*, and also owner of the *legal* estate, he is neither bound to renew in future, nor to contribute to the expenses of future renewal: the remainder-man, if he think proper to take the benefit, must bear the entire charge (*z*). It is apprehended, however, that the tenant for life must do all necessary acts for enabling the remainder-man to renew (*a*), provided he (the tenant for life) can do so without prejudice to his estate.

But, supposing an intention can be implied from the terms of the will, or nature or formation of the gift, that the tenant for life is to be obliged to renew, he is not at liberty to put himself, as to contribution, in a different situation by making himself one of the *cestuis que vie*, from that in which he would be if any other life were in the lease, unless upon the whole will, or other instrument, it appear that it was intended that he should be at liberty to do so (*b*).

If the tenant for life, being one of the *cestuis que vie*, have only an *equitable* interest, his liability may possibly admit of doubt (*c*).

If, under the same circumstances of renewals being directed, without the provision of a fund to answer the charge, the tenant for life, whether one of the *cestuis que vie* or not, renew, and advance money for the purpose, he will become an incumbrancer on the estate, and his representatives will be entitled to so much as shall be calculated to be the value of the renewed estate left at his decease, with compound interest at 4 per cent. per annum on that sum from the time of its being advanced (*d*). And the same

Playters v. Abbott, 2 Myl. & Keen, 97.
The Earl of Shaftesbury v. The Duke of Marlborough, 2 Myl. & Keen, 111.
Reeves v. Creswick, 3 Yo. & Col. Exch. 715.

(*z*) *White v. White*, 4 Ves. 33. 9 Ves. 562.

(*a*) 4 Ves. 27, n.

(*b*) *White v. White*, 9 Ves. 561. See

Seudamore v. Stratton, 1 Bos. & Pul. 455, *at law*.

(*c*) *Verney v. Verney*, 1 Ves. 428; S. C. Ambl. 88. *White v. White*, 4 Ves. 33; and ante, p. 770, n. (*g*).

(*d*) *Nightingale v. Lawson*, 1 Bro. C. C. 440. *Adderley v. Claverley*, 2 Bro. C. C. 658; S. C. 2 Cox, 192. *White v. White*, 9 Ves. 558-9. 561.

rule prevails though the settlement contain no directions for a renewal (*e*).

If, under the same circumstances, the remainder-man advance the money, the tenant for life not being one of the cestuis que vie, the converse of the rule applies (*f*).

If a will or settlement indicate an intention that renewals should be effected, and provide for the payment of the fines and expenses out of the rents and profits, or by mortgage or sale of the settled estate, the manner of raising the fines, and the contribution of the tenant for life, must be determined by the intention to be collected from the whole instrument (*g*).

In a late case (*h*), a testator devised certain freehold and copyhold hereditaments to trustees, upon trust, out of the rents and profits, or by mortgage, sale, or other disposition of the premises, or any part thereof, to raise such sums as should be necessary for discharging the fines and fees of the trustees' admission to the copyholds, and the costs of keeping the buildings in repair, and the land-tax, quit rents, and other outgoings; and, subject thereto, upon trust to pay his widow a life annuity, in lieu of dower, and, subject thereto, upon trust for Elizabeth Wright for life, with remainders over; and Sir John Leach, M. R., was of opinion, that it was the intention of the testator that the fines and fees should be raised by sale or mortgage, and that Elizabeth Wright should bear no other burthen in respect of such fines than the interest of the mortgage. This decision is as applicable to the case of fines for renewals of leaseholds, as to the case of fines for admission to copyholds.

But in a case (*i*) which came before the same learned judge very shortly afterwards, where leasehold property, held partly for lives, and partly for years, was devised to trustees, upon trust to renew the premises, and, out of the rents, issues, and

(*e*) *Lawrence v. Maggs*, 1 Ed. 453; S. C. cited, 1 Bro C. C. 193.

(*f*) *White v. White*, 9 Ves. 557-8.

(*g*) *Playters v. Abbott*, 2 Myl. & Keen, 97. 103. *The Earl of Shaftesbury v. The Duke of Marlborough*, 2

Myl. & Keen, 111. 119.

(*h*) *Playters v. Abbott*, sup.

(*i*) *The Earl of Shaftesbury v. The Duke of Marlborough*, 2 Myl. & Keen, 111.

profits, to pay the fines and expenses of renewal, and in the next place upon trust for the benefit of certain persons who took freehold and copyhold property in strict settlement under the same will, it was held, that the tenant for life, and the other persons in remainder who should successively be in possession of the same estates, were bound to sustain all expenses of the several renewals of the leases, which, during the period of their enjoyment respectively, were made necessary by the directions of the will. The trust as to the renewals was considered to override all beneficial interest in the leases; and in this respect the case was said to be distinguishable from all others that had occurred.

The same principle was acted on in the late case of *Greenwood v. Evans* (k).

If a testator authorise a sum to be charged on the estate from time to time for the purpose of providing for renewals, and a tenant for life, on renewing, consistently with the testator's intention, constitute himself one of the *cestuis que vie*, he will not be bound again to renew, on the falling of another life; though he will be compelled to join in a mortgage of the estate, to enable the remainder-man to renew, and to pay the interest of the sum raised during his life (l).

Where a testator seised in fee of a farm, and possessed of a lease of the rectorial tithes of the parish of A., in which the farm lay, devised the farm to his nephews in tail, and the tithes to his brother, upon condition that his brother, his executors, &c., owners of the tithes, should at all times, after his (the testator's) decease, free and discharge the said farm from all manner of tithes payable out of the same to the owner of the said tithes of A., and the brother devised his interest in the lease to his son, who obtained several renewals, and in 1782 sold the existing lease to A. N., with notice of the trusts of the will, it was held, that a party claiming under A. N.'s will, and who took a renewal in 1817, held the renewed term upon the trusts of the will, that he had no

(k) *Greenwood v. Evans*, 1 Beav. 44.

(l) *White v. White*, sup.

beneficial title to the tithes, and that the owner of the farm was not bound to contribute to the fines paid for renewal (*m*).

In the late case of *Wadley v. Wadley* (*n*), a testator devised his copyhold, held by him for four lives, renewable on payment of a fine, to trustees, upon trust for his wife for life, she keeping good the renewals; and, subject thereto, upon trust to let the same, and after paying the chief and other rents, land-tax, and keeping full the lives, to pay the residue to his son for life; and, after his decease, upon trust to sell, and dispose of the proceeds of sale among the testator's grandchildren. The widow died insolvent, having omitted to replace a life which dropped in her lifetime. Seven years after, another life fell, the first not having been replaced. Under these circumstances, it was decreed, that two new lives should be named, the son being bound to supply a substitute for the second life, but not for the first; that so much of the expenses of renewal as would have been payable, had one been effected by the widow, and interest thereon at five per cent. calculated to the decease of the second life, and costs, should be charged by way of mortgage at four per cent. on the corpus of the devised estate; and that the son should pay the difference, and keep down the interest on the mortgage.

The old rule, which required the tenant for life to pay one-third, and the remainder-man two-thirds of the amount (*o*), has long been exploded (*p*). It was succeeded by one in which the capital provided was to be paid by the remaindermen, the tenant for life keeping down the interest (*q*); but this also, being founded on a wrong calculation, yielded in its turn to the modern rule, which proceeds on the principle of

(*m*) *Webb v. Lugar*, 2 Yo. & Col. Exch. 247.

(*n*) *Wadley v. Wadley*, 2 Col. 11.

(*o*) *Rowell v. Walley*, 1 Ch. Rep. 218. *Ballet v. Spranger*, Prec. Ch. 62. *Cornish v. Mew*, 1 Ch. Ca. 271. *Graham v. Lord Londonderry*, cited, 2 Bro. C. C. 246. *Lock v. Lock*, 2 Vern. 666, n. (3), 3rd edit. by Raithby.

(*p*) *Verney v. Verney*, 1 Ves. 428;

S. C. Anbl. 88. Nightingale v. Lawson, 1 Bro. C. C. 440-3; 1 Cox, 181. *Stone v. Theed*, 2 Bro. C. C. 243-8. *White v. White*, 4 Ves. 32, 33; 9 Ves. 560.

(*q*) *Buckeridge v. Ingram*, 2 Ves. jun. 652, 666. *White v. White*, 4 Ves. 33. See also *Lord Penrhyn v. Hughes*, 5 Ves. 107.

actual benefit and enjoyment derived by the respective parties under the renewal (*r*); and the position that the tenant for life is bound to pay the interest, must be understood with this allowance, that he is further bound to have charged upon him a due proportion of the benefit he takes in the estate by the application of the principal paid for the purchase of the renewed interest in the estate (*s*).

There is great difficulty, however, in assessing the amount of contribution between tenant for life and remainder-man, according to their actual enjoyment, in the case of leaseholds for life; as, the time of renewal being necessarily uncertain, there are no means of ascertaining the proportion to be borne by the tenant for life until his death (*t*). And as it would be impossible, as Lord Eldon remarked (*u*), to determine *ab ante*, without the hazard of determining wrong, the court would make the tenant for life give security for what might eventually become due. And there is no difference between a renewable term for years, and a lease for lives renewable (*x*); though, in the case of leaseholds for years, when the period of renewal is certain, the trustees may retain an annual sum out of the rents and profits, from the tenant for life, so as to insure a due contribution on his part towards the expense of renewal (*z*).

Life insurances present a ready mode of obtaining a fund for renewal of leases held on lives, or for years determinable on lives. And in a case before cited (*a*), the Master, by his report, approved of a proposal to insure each of the lives upon which the leases were held against the life of the Duke of Marl-

(*r*) *Stone v. Theed*, 2 Bro. C. C. 448. *White v. White*, sup., and on appeal, 9 Ves. 554. *Allan v. Backhouse*, 2 Ves. & B. 65. 79; *S. C. Jacob*, 631. *Lord Montfort v. Lord Cadogan*, 17 Ves. 485. *Greenwood v. Evans*, 4 Beav. 44.

(*s*) Per Lord Eldon, in *White v. White*, on appeal, 9 Ves. 560.

(*t*) *The Earl of Shaftesbury v. The Duke of Marlborough*, 2 Myl. & Keen, 111. 121. *Greenwood v. Evans*, 4

Beav. 44.

(*u*) 9 Ves. 556. *The Earl of Shaftesbury v. The Duke of Marlborough*, 2 Myl. & Keen, 122.

(*x*) 9 Ves. 559.

(*z*) *The Earl of Shaftesbury v. The Duke of Marlborough*, 2 Myl. & Keen, 121.

(*a*) *The Earl of Shaftesbury v. The Duke of Marlborough*, 2 Myl. & Keen, 111. 124. And see *Greenwood v. Evans*, 4 Beav. 44.

borough, for a sum sufficient to provide for future renewals of the respective leases in case of any of the lives dropping during the life of the duke; the annual premiums upon the policies to be paid by the receiver out of the rents and profits of the leasehold estate.

In a still later case (*b*), certain freehold and copyhold property, held on two leases for lives, was devised to trustees, in trust for E. I. C. for life, with remainder to her children absolutely. Upon the testatrix's decease there remained only one cestui que vie surviving in each lease, and as no funds were provided by the will for the renewal, the only means of meeting the expenses were to raise the amount on mortgage of the renewed leases themselves. This course of proceeding was sanctioned by the court, and the following arrangement directed to be carried into effect:—The period of enjoyment by the tenant for life under each of the old leases being the joint duration of her own life and that of the then surviving cestui que vie, and the period of her enjoyment under each corresponding renewed lease being, in like manner, the joint duration of her life and those of the new cestuis que vie, or the longest liver of them, the difference between the values of the estates for these two periods gave the benefit derived by the tenant for life from the renewals in question. The residue of the increased value necessarily expressed the benefit derived from the renewals by Mrs. C.'s children. The fines and expenses of renewal being divided in these proportions, the total amount which fell to the share of the tenant for life was directed to be insured upon her life, for the purpose of providing upon her decease for the payment of a corresponding part of the principal of the mortgage debt to be raised. The policy of assurance was assigned to the mortgagee, and directions were given for payment of the premiums on the policy, and for keeping down the interest on the entire mortgage debt out of the annual rents and profits of the estates.

If a tenant for life, upon whom a testator has imposed the

(*b*) *Reeves v. Creswick*, 3 Y. & Col. Exch. 715.

obligation of renewing, out of the rents and profits, at the customary times, have omitted to do so, his assets are liable to contribute after his death, not only such sums as would have been requisite had he performed his duty, but such additional sums also, in the shape of increase of fines, &c., as may have been occasioned by his default. In other words, the remainder-man has a right to call on the assets of the tenant for life to put him in the situation he would have been in if the provisions of the deed or will had been duly carried into effect (*c*). But if the remainder-man, under these circumstances, renew at an exorbitant fine, the court will not make the amount of that fine the basis of its calculation of the sum to be paid out of the assets of the tenant for life (*d*). In the case in question, a reference was directed to the Master, to ascertain what would have been a reasonable sum to have been paid by the tenant for life at the time at which he ought to have renewed; and the consideration of interest and costs was reserved.

If a renewal by the tenant for life directed to renew out of the rents become impossible by circumstances over which he has no control, the remainder-man has no right to the rents which would otherwise have been applied to keep the estate alive. This happened in a case where lands held under a crown lease were settled, in trust to pay certain annuities, and the surplus rents to T. for life, a fund for renewals being directed to be reserved out of the rents: a renewal from the crown becoming impracticable, in consequence of an act of Parliament, it was held that, as no renewal could be obtained, no accumulation of the rents for fines could take place; and that the annuities should be paid, and the surplus rents to T. for life, for so much of the lease as remained (*e*).

(*c*) *Lord Montfort v. Lord Cadogan*, 17 Ves. 485; S. C. 19 Ves. 635. 640; and 2 Meriv. 3, on appeal. *Colegrave v. Manby*, 6 Madd. 72; S. C. 2 Russ. 238. *Bennett v. Colley*, 5 Sim. 181; S. C., affirmed on appeal, 2 Myl. & Keen, 225; S. C. *Cooper's Sel. Ca. temp. Brougham*, C., 248.

(*d*) *Colegrave v. Manby*, sup.

(*e*) *Richardson v. Moore*, M. R., 1 May, 1817, cited, 6 Madd. 82. *Tardiff v. Robinson*, L. C., January, 1819, cited, 6 Madd. 82, and n. (*l*). But see *Colegrave v. Manby*, 6 Madd. 72; S. C., affirmed on appeal, 2 Russ. 238.

Where the tenant for life renews out of the rents and profits, in pursuance of the directions of the will or settlement, he is entitled for his own exclusive benefit to the fines paid for the renewal of underleases (*f*).

If one of two joint-tenants of a lease pay for the renewal, he has a lien on the share of his co-tenant, though under settlement, for a moiety of the fines and expenses; for the renewal enures to the uses of the settlement (*g*).

In a former page (*h*), we have seen that fines paid for the renewal of leases for the benefit of infants, lunatics, and femmes covert, are by section 14 of the act of 11 Geo. 4. and 1 W. 4. c. 65, directed to be charges on the renewed estate.

Secondly, as to parties claiming derivatively as underlessees.

An underlessee of a renewable leasehold usually protects himself by a covenant from his immediate lessor, that he (the lessor), on his own estate being renewed, will renew to the underlessee. If the lessee thus covenant to renew without fine or any other expense whatsoever, except that of the lease (*i*), or covenant to renew in general terms, without alluding to the fines or expenses (*k*), the court will decree a performance of the covenant in favor of the underlessee, without contribution, although the original lessor may demand an enormous fine compared with that formerly paid on each renewal, unless the covenantor will abandon the property, and allow the underlessee to stand in his place (*l*).

Lately, a lessee of lands held under a demise from the Archbishop of Armagh underlet part by indenture for the term of twenty years, and for such further terms as should or might for ever thereafter be added thereto by virtue of the covenant for renewal thereafter contained; yielding and

(*f*) *Milles v. Milles*, 6 Ves. 761.

(*g*) *Hamilton v. Denny*, 1 Ball & Beat, 199.

(*h*) *Ante*, p. 750.

(*i*) *Revell v. Hussey*, 2 Ball & Beat, 280.

(*k*) *Evans v. Walshe*, 2 Scho. & Lef. 519. *Thomas v. Burne*, 1 Dru. & Wal. 657.

(*l*) *Evans v. Walshe*, *sup.* *Revell v. Hussey*, *sup.*

paying during that demise and every renewal thereof a certain rent; and covenanted that he would from time to time and at all times thereafter, as often as he or they should obtain a renewal from the archbishop of the town-lands of B., whereof the premises thereby demised were part, execute unto the underlessee a new lease of the thereby demised premises, for such term of years (one less only excepted) as should be obtained from the archbishop, at and under the yearly rent and fees, and subject to the like clauses, covenants, and agreements, therein contained; he the underlessee paying a proportion of whatever fees, fines, rise-rent, lease-money, and expenses, the said lessee should pay to the archbishop for renewal of his grand lease; the said several and respective proportions to be at such rate as 23 acres (the quantity contained in the underlease) bore to 350 acres (the number contained in the grand lease); the said fines, &c., so to be ascertained and adjusted, to be paid by the underlessee in one month after notice given in writing by the lessee of the amount and particulars thereof; or, in failure of payment, that it should be lawful for the lessee to enter upon the demised premises, and distrain for the same as for non-payment of rent; and, further, that he the lessee should not at any time or times thereafter, under any pretence or pretext whatever, neglect, omit, or leave out the premises thereby demised, or any part thereof, in any future or subsequent renewal of his grand lease with the see of Armagh; but should from time to time continue to renew the same with his other lands as theretofore; it being the true intent and meaning of that indenture and of the parties thereto, that, upon the regular payment of the said yearly rent, fees, fines and expenses, and the due performance of the several clauses, covenants, and conditions, contained therein, the said underlessee should, under and by virtue of such renewal so to be had in manner as aforesaid, have a durable and permanent interest in the premises. The lessee having renewed the grand lease, filed his bill to compel the underlessee to take a renewal of the premises comprised in the underlease, and to

pay his proportion of the fines. The defendant resisted performance, on the ground that the lessee was under no absolute obligation to procure a new lease, and grant a renewal, and, therefore, that it was optional with him, the defendant, to accept of a renewal or not. The court, however, considered it clear, in point of construction, that the defendant was bound to take the renewal; and, in point of equity, that the agreement was not unreasonable nor against conscience (*m*).

Where a party (the plaintiff), being possessed of certain lands for a term of years under a lease from the Archbishop of Dublin, demised twenty-one acres, parcel of the lands, to another (the defendant) for twenty-one years, and covenanted that as often as he should obtain a renewal of the lease under which he held the premises thereby demised, and the said other premises, upon the defendant's paying all arrears of his rent, and one full third-part of such fine as the plaintiff should pay for obtaining such renewal of the said lease under which he the said plaintiff then held the premises thereby demised, and the other parts, he would execute to the defendant a renewal of his term; and the defendant contended that he was bound to pay his fine in proportion to the quantity of the land demised to him, and not one-third of the whole fine paid by his lessor to the archbishop; the court held, that the lease expressly provided, that the tenant should pay one-third of the whole of the renewal fine; for it was that he should contribute one-third of the fine paid by the plaintiff to the archbishop for those and other lands comprised in the original lease; and that there was no distinct or separate fine paid to the archbishop for the lands comprised in the defendant's lease (*n*).

But where a lessee underlet for a term of eighteen years, and covenanted, at the end of that term granted, to grant a new lease of the premises for a further term which would expire

(*m*) *Curry v. Stanley*, 1 Hay. & Jo. 487.

(*n*) *Lord Frankfort v. Thorpe*, 2 Ball & Beat. 372.

at Christmas 1831, and the underlessee covenanted that he would from time to time during the eighteen years pay such part of the fine and fees which upon every renewal of the original lease should be payable by his lessor in respect of the premises underlet, and the mesne lessor renewed for a period exceeding the new interest covenanted to be granted to the underlessee, it was held that the underlessee was not bound to pay a proportion of the fine in respect of the whole of the renewed term granted to the mesne lessor, but such part of it only as was commensurate with his interest in the premises (*o*).

So, where a lessee, (A), under a dean and chapter for twenty-one years, renewable every seven, underlet to another, (B), and covenanted, within two months after the dean and chapter should have renewed the lease under which he then held, to execute to B. a lease for such further term as would make up a term of sixty-one years from the 29th day of September, 1778, [of which term twenty-four years were then unexpired,] B. from time to time surrendering his then subsisting lease, and paying upon every such renewal such a proportion of the fine which A. should have paid to the dean and chapter on renewing the lease or leases under which he should hold the premises, as should have been imposed on account of any new buildings erected or to be erected by B. upon the premises; it was held, that B. was not bound to contribute to the fine paid on any renewal subsequent to that which first enabled A. to make up the term agreed to be granted (*p*).

In the case of *Davis v. Hone* (*q*), a lessee under a dean and chapter lease underlet at double the rent payable by him to his lessors, and covenanted, from time to time, on obtaining renewals from his lessors, to renew to the underlessee, upon his paying 300*l.* as a fine, and also double the yearly rent,

(*o*) *Charlton v. Driver*, 2 Brod. & Bing. 345; S. C. 5 J. B. Mo. 59.

(*p*) *Clutton v. Fleming*, 8 Sim. 105.

(*q*) *Davis v. Hone*, 2 Scho. & Lef.

341; S. C., on appeal, nom. *Hone v. Davis*, 2 Dow, P. C. 546. And see

Curry v. Stanley, 1 Hay. & Jo. 487.

496.

and no more, to be reserved and made payable by the mesne lessor to the dean and chapter; and it was provided, that in case the sub-lessee should, upon any future renewal to be made by the dean and chapter, apprehend that the reserved rent was too much advanced, it should be at his option whether he would accept of a renewal or refuse the same, and be content with the residue of his unexpired term; and it seems to have been conceived that the option was intended to guard against the effect of an increase of rent if insisted upon by the dean and chapter, independently of any endeavour by the mesne lessor to procure if he could a renewal at an increased rent and small fine.

Where an annuity for life was granted by a feme sole, and secured upon tithes held by her under a lease from the dean of St. Asaph, and she afterwards renewed the lease, married, and died, and her husband administered, and renewed with his own money, it was held, that the annuity was a charge upon the renewed term generally; and that the grantee was not bound to contribute to the expense of renewal (r).

If, in the case of a sub-tenancy of a renewable leasehold, the lessee and underlessee depart from the strict terms of their contract, for example, by the former demanding, and the latter paying, a larger fine than was originally stipulated for, and by an additional term being granted to the latter, the court will not decree a specific performance on the strict letter of the contract, but will enforce an equitable modification of it, reference being had to the intervening conduct of the parties themselves (s).

(r) *Moody v. Matthews*, 7 Ves. 174.
And see *Winslow v. Tighe*, 2 Ball & Beat. 195. *Stubbs v. Wroth*, 2 Ball & Beat. 548; and *Webb v. Lugar*, 2

Yo. & Col. Exch. 247.

(s) *Davis v. Hone*, 2 Scho. & Lef. 341; S. C., on appeal, *nom. Hone v. Davis*, 2 Dow P. C. 546.

SECTION VI.—AS TO THE SURRENDER OF EXISTING INTERESTS
AS A PRELIMINARY STEP TO A RENEWAL.

Formerly, a renewal could not be obtained by a lessee without a surrender of all the underleases derived out of the original lease; the consequence of which was, that every underlessee had it in his power to prevent or delay a renewal by refusing to surrender his interest. And even a court of equity could not compel such surrender, notwithstanding an offer by the original lessee to make a new lease to his lessee for the term then to come, and at the same rent (*t*). But the inconvenience was remedied by the statute of 4 Geo. 2. c. 28(*u*); which enacted, “that in case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord or landlords, the same new lease shall, without a surrender of all or any the underleases, be as good and valid, to all intents and purposes, as if all the underleases derived thereout had been likewise surrendered at or before the taking of such new lease; and all and every person and persons in whom any estate for life or lives, or for years, shall from time to time be vested by virtue of such new lease, and his, her, and their, executors and administrators, shall be entitled to the rents, covenants, and duties, and have like remedy for recovery thereof, and the underlessees shall hold and enjoy the messuages, lands, and tenements, in the respective underleases comprised, as if the original leases out of which the respective underleases are derived had been still kept on foot and continued; and the chief landlord and landlords shall have and be entitled to such and the same remedy by distress or entry in and upon the messuages, lands, tenements, and hereditaments, comprised in any such underlease for the rents and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease

(*t*) Colchester *v.* Arnott, 2 Vern. 383; S. C. Prec. Ch. 124.

(*u*) 4 Geo. 2. c. 28. s. 6. And see 5 & 6 Vict. c. 108. s. 17, ante, p. 278.

out of which such underlease was derived (*x*), as they would have had in case such former lease had been still continued, or as they would have had in case the respective underleases had been renewed under such new principal lease, any law, custom, or usage, to the contrary thereof notwithstanding."

Hence, independently of the late acts of 7 & 8 Vict. c. 76, and 8 & 9 Vict. c. 106 (*y*), notwithstanding the destruction of the mesne reversion by surrender, the mesne lessor's rights and remedies against the underlessee remain unaffected; but this benefit is confined to the particular case of a surrender for the purposes of renewal (*z*).

And it was provided by a statute of 39 & 40 Geo. 3 (*a*), that where any person then holding, or who should thereafter hold, any lease of any person having spiritual or ecclesiastical promotion, should hold the same, or any specific part of the lands or tenements thereby demised, in trust for any other person, or should have granted any under-lease of any specific part of his holding, and be under any engagement for renewal thereof, when his own lease should be renewed, it should be lawful for such person as first mentioned, to surrender his lease, in order that separate and distinct leases might be granted by the original lessor of such specific parts of the premises as should have been held in trust, or subject to such engagements for renewal to the respective underlessees and cestuis que trust upon fair and reasonable terms, subject to an apportionment of the accustomed rent and other payments; and that every such surrender, and the new leases to be granted thereon, should be effectual in law and equity, notwithstanding such underlessees and cestuis que trust, or any of them, should be infants, issue unborn, femmes covert, persons absent from the realm, or otherwise incapacitated to act for themselves, pro-

(*x*) See *Doe dem. Palk v. Marchetti*, 1 Barn. & Adol. 715.

(*y*) By which further provision is made for preserving the rights and liabilities of a mesne reversioner notwithstanding the merger or surrender

of his estate. See post, Part the Seventh, Ch. I. Sect. III.

(*z*) See *Signior Thre'r v. Barton*, Mo. 94. *Webb v. Russell*, 3 Term Rep. 393. 402.

(*a*) 39 & 40 Geo. 3. c. 41. s. 10.

vided that such new leases should be for the benefit of the persons entitled to the benefit of such surrendered lease, and be expressly so declared in the body of each such new lease respectively.

If a mortgagee by assignment of a dean and chapter lease for lives refuse to surrender, a court of equity will not compel him, as he is an incumbrancer; for he may object to the lives proposed, and insist that the lives in being are better, or oblige the tenant, the mortgagor, to propose other lives, or redeem him: but it will be otherwise if a lease for years only be mortgaged; for, upon surrendering the old lease, in which there is only a remainder of a term to come, a new and longer term would be granted, which, being a better security, is an advantage to the mortgagee (*b*).

(*b*) *Winne v. Bampton*, 3 Atk. 476.

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